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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-728

HAROLD FRANKS and JOHNNIE LEE,

Petitioners,

v.

BOWMAN TRANSPORTATION COMPANY, INC., and INTERNATIONAL UNION OF DISTRICT 50, ALLIED AND TECHNICAL WORKERS OF THE UNITED STATES AND CANADA, and ITS LOCAL No. 13600,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Harold Franks and Johnnie Lee, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 3, 1974.

Opinions Below

The opinion of the Court of Appeals, reported at 495 F.2d 398, is reprinted in the Appendix hereto at pp. A1-A41. The Order of the Court of Appeals denying Petitioners' Petition for Rehearing, reported at 500 F.2d 1184, is reprinted in the Appendix at p. A44. The unreported opin-

ion, decree, and judgment of the United States District Court for the Northern District of Georgia are reprinted in the Appendix at A45-A70.

Jurisdiction

The judgment of the Court of Appeals was entered on June 3, 1974. Petitioners' timely Petition for Rehearing was denied on September 12, 1974. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

Question Presented

Whether in an action based on Title VII and 42 U.S.C. § 1981 the district courts are prohibited as a matter of law from granting, as part of the remedy to black job applicants unlawfully refused employment, the full seniority they would have obtained but for the employer's discrimination?

Statutory Provisions Involved

The pertinent sections of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, as amended, provide:

Section 703(a), 42 U.S.C. § 2000e-2(a):

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 703(c), 42 U.S.C. § 2000e-2(c):

It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin.

Section 703(h), 42 U.S.C. § 2000e-2(h):

Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.

Section 706(g), 42 U.S.C. § 2000e-5(g):

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. . . . No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).

The Civil Rights Act of 1866, 42 U.S.C. § 1981, provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Statement of the Case

This class action filed in the United States District Court for the Northern District of Georgia on May 5, 1971, challenged practices of racial discrimination in employment by Respondents Bowman Transportation, Inc., and Local No. 13600, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, and 42 U.S.C. § 1981. Petitioner Franks, a discharged former employee of Bowman, alleged that Respondents had engaged in across-the-board practices of racial discrimination in employment. Petitioner Lee, a rejected job applicant who was later hired and discharged by Bowman, intervened in the case and filed a similar class action complaint on July 21, 1971.

The district court found that Petitioner Franks had been discriminatorily denied promotion to better jobs reserved for whites and discriminatorily discharged in 1968 for filing an EEOC charge alleging promotional discrimination (A55-A56), and that Bowman's initial refusal to hire Petitioner Lee as an over-the-road (OTR) driver in January, 1970, was racially motivated (A59-A60, A63). The district court also found that Respondents had engaged in a comprehensive program of racial discrimination until after suit was filed (A46-A52).[1]

With respect to OTR jobs, the court found that Bowman followed "an unwritten policy" against hiring black applicants; that no black OTRs were employed anywhere in

[1] Prior to 1968, Bowman maintained completely segregated jobs and departments, with almost no black employees anywhere in the Company (A47-A48). By August, 1971 (after suit was filed) Bowman still had only a token few blacks in most job categories and none at all in several of the more desirable positions (A48). Bowman refused to allow transfers, which effectively locked blacks into their few inferior jobs (A47, A51). Blacks were consistently relegated to the lower paying positions (A48-A49).

the Company until September, 1970;[2] and that prior to the first hiring of blacks as OTRs, experienced and apparently qualified black applicants had sought OTR jobs (A50).[3] The court held the case maintainable as a class action under Rule 23(b)(2), Federal Rules of Civil Procedure (A53). It allowed Petitioner Lee to represent a subclass, denominated "Class 3", consisting of all black OTR applicants who applied prior to January 1, 1972 (A53, A66). Finding that members of this subclass had been discriminatorily denied OTR opportunities, the court granted them "preferential re-application rights" to renewed and non-discriminatory consideration for the OTR job (A66-A67). It rejected Petitioners' demand that such discriminatees, if subsequently hired, be granted OTR seniority back to the date when they would have been hired but for Bowman's discrimination.[4]

On Petitioners' appeal, the Court of Appeals affirmed all the trial court's findings of discrimination,[5] found certain

[2] Bowman employed no blacks and 415 whites as OTRs in July, 1965; no blacks and 464 whites as OTRs in March, 1968; and 11 blacks (all at one of the four OTR terminals) and 499 whites as OTRs in August, 1971 (A48). At the time of trial (March, 1972), Bowman's OTR workforce was only 3.3% black (A18 n.11, *cf.* A50).

[3] The record shows that Bowman rejected 196 black OTR applicants in 1970-1971 alone. Of these, 115 list truck driving experience on their applications which meets Bowman's basic standards; Bowman verified the claimed experience of at least 48 black applicants whom it nevertheless rejected.

Two black rejected OTR applicants other than Lee testified at trial. The court found that each was "experienced and not obviously disqualified" but had been discriminatorily rejected (A50).

[4] The court expressly relied on its reasoning on the back pay issue in *United States* v. *Georgia Power Co.*, 3 EPD ¶8318 (N.D. Ga. 1971) (A53-A54); that decision was subsequently reversed, 474 F.2d 906 (5th Cir. 1973).

[5] With respect to the OTR hiring issue, the Court of Appeals held,

> The record in this case shows that Bowman followed a conscious policy of excluding blacks from its OTR Department until September 1970, a time over five years after the effective date of the Civil Rights Act of 1964. The District Court found that Bowman, although aware of its legal obligations, intentionally continued to follow its discriminatory policy and put off hiring black OTR drivers as long as it could (A31).

other practices unlawful (A15-A20), and held that Petitioners were entitled to affirmative injunctive relief as well as class back pay (A24-A40).[6] But the Court of Appeals rejected Petitioners' request for full seniority relief for blacks previously refused hiring, who successfully re-apply for OTR jobs (members of "Class 3").[7] Characterizing the remedy sought as "a giant step beyond permitting job competition on the basis of company seniority" and as "constructive seniority" (A29-A30), the Court held that Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), precludes such relief as a matter of law (A30-A31). The Court based its conclusion on the view that a seniority system is "bona fide" and therefore protected by Section 703(h) regardless of the prior unlawful exclusion of blacks from sharing the benefits of that system.[8]

[6] Respondent Bowman's Petition for a Writ of Certiorari presenting the class back pay issue, No. 74-424, was denied on December 9, 1974.

[7] The record does not reveal how many persons are in this group because the district court denied Petitioners' request for retained jurisdiction and reporting provisions. (The Court of Appeals ordered the request granted, A37.) 212 members of "Class 3" were sent notice inviting them to re-apply for priority consideration for OTR jobs, pursuant to the decree (A67); presumably at least some were hired if Bowman had abandoned its policy of racial exclusion.

[8] The Court of Appeals did not base its decision on the same reasons as the district court; it rejected those grounds in its discussion of the back pay issue (A37-A39).

REASONS FOR GRANTING THE WRIT

I.

The Petition Presents an Important Unresolved Issue of Statutory Interpretation Affecting Thousands of Persons Injured by Employment Discrimination.

The critical issues of employment discrimination law at present involve remedies. This Court has decided Title VII cases involving procedural questions,[9] and cases defining standards for proof of discrimination.[10] This case brings to the Court an important question involving the scope of remedial authority vested in the district courts once discrimination is established. The Court of Appeals decision resolved that question in a manner which conflicts in principle with decisions of this Court and lower courts.

The decision below would severely limit courts' power and EEOC's authority to grant effective relief to thousands of victims of unlawful hiring discrimination (I, *infra*). That restriction is inconsistent with numerous decisions in employment discrimination cases and other fields of labor law and with the remedial purpose of Title VII (II, *infra*). Nothing in the language or legislative history of Title VII requires or supports the restriction (III, *infra*). In any event, a limiting interpretation of Title VII's provisions should not bar relief under 42 U.S.C. § 1981 (IV, *infra*).

The Court of Appeals decision interposes a general prohibition on seniority relief for victims of hiring discrim-

[9] See, *e.g.*, *Love* v. *Pullman Co.*, 404 U.S. 522 (1972); and *Crosslin* v. *Mountain States Tel. & Tel. Co.*, 400 U.S. 1004 (1971), *vacating and remanding* 422 F.2d 1028 (9th Cir. 1970).

[10] See, *e.g.*, *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Phillips* v. *Martin-Marietta Corp.*, 400 U.S. 542 (1971); *McDonnell-Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).

ination. The Court found a barrier not in the circumstances of the case, but in the terms of Section 703(h) of Title VII, 42 U.S.C. § 2000e-(h). If that decision stands, no court may grant any job applicant rejected because of race, sex, religion, or national origin—whatever the circumstances—hiring with the seniority the applicant would have acquired but for the discriminatory rejection.

The prohibitory effect of the decision will cut back on relief now being obtained, or that could be obtained, in many cases. In several Title VII cases, the United States Department of Justice has secured decrees granting compensatory seniority to unlawfully rejected applicants.[11] The United States Equal Employment Opportunity Commission (EEOC) has filed 306 pending lawsuits, 174 of which seek relief from discrimination in hiring [information supplied by EEOC Litigation Services Branch, December 5, 1974]. And EEOC has thousands of pending administrative charges of discrimination involving refusals to hire.[12] In conciliating, settling, or litigating these claims, EEOC's remedial effectiveness may be limited by the decision below.[13] Many private plaintiffs' refusal-to-hire suits will also be adversely affected.

[11] See, e.g., *United States* v. *Georgia Power Co.*, 7 EPD ¶9167 (N.D. Ga. 1974) at p. 6885, issuing decree on remand from 474 F. 2d 906 (5th Cir. 1973); *Jones* v. *Lee Way Motor Freight, Inc.*, 7 EPD ¶9066 (W.D. Okla. 1973) at p. 6500.

[12] EEOC's 7th Annual Report for Fiscal Year ended June 30, 1972 (its most recent) shows that 8,836 charges of hiring discrimination were received in fiscal year 1972. In fiscal year 1974, 14,866 actionable charges of hiring discrimination were filed (per information supplied by EEOC Systems Control Branch, December 2, 1974). No available data shows how many charges involve jobs to which seniority applies, but the percentage is doubtless substantial.

[13] EEOC's authority derives solely from Title VII. Thus, a limitation read into Title VII may hamstring EEOC in all its proceedings.

The principle announced below would permanently disable the federal courts from even entertaining claims for relief from discriminatory seniority-based layoff practices. Layoffs due to reduction in force are a recurrent feature of the American economy, as exemplified in the current recession. Such layoffs in industry are commonly controlled by the "last hired, first fired" principle. Where racial or other minorities were "last hired" because of discrimination, that principle raises significant employment rights issues. If allowed to prevail, the decision below would prohibit courts from addressing those issues, by exempting employment seniority systems from modification regardless of their effects and circumstances.

II.

The Court of Appeals Decision Is in Conflict With the Remedial Purpose of Title VII and With the Whole Scheme of Federal Labor Law.

A. In Section 706(g) of Title VII, 42 U.S.C. §2000e-5(g), Congress gave the courts broad equitable powers to remedy employment discrimination. The provision authorizes courts to enjoin such discrimination "and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees . . . or any other equitable relief as the court deems appropriate." In 1972 a Conference Committee of the Senate and House reiterated Congress's intent to give courts plenary remedial powers:

> The provisions of this subsection [706(g)] are intended to give the courts *wide discretion exercising their equitable powers to fashion the most complete relief possible.* In dealing with the present section 706(g) the courts have stressed that the scope of relief under

> that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful practice complained of, but also *requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.* [emphasis added]

Section-by-Section Analysis of H.R. 1746, reprinted by Subcommittee on Labor of the Senate Committee on Labor and Public Welfare in *Legislative History of the Equal Employment Opportunity Act of 1972* (1972), pp. 1844, 1848. See *Alexander* v. *Gardner-Denver Co.*, 39 L.Ed. 2d 147, 157-158 (1974). The only limitation on the grant of remedial authority is found in Section 706(g) itself: no such relief may be granted in the absence of a finding of discrimination.

The Court of Appeals did not doubt that respondent Bowman had engaged in discrimination made unlawful by Section 703(a), requiring a grant of relief under Section 706(g), or that class 3 members lost jobs as a result (A30). Nevertheless it barred full seniority relief on the basis of Section 703(h), which does not by its terms define or restrict available remedies but rather specifies what constitutes an unlawful practice.

The Court's theory in borrowing from Section 703(h) to narrow the scope of Section 706(g) is incompatible with federal courts' duty to grant effective relief from racial discrimination. Such relief must include affirmative measures designed to eradicate, insofar as possible, all the continuing effects of past discrimination.[14] The decision

[14] *United States* v. *Louisiana*, 380 U.S. 145, 154 (1965); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429-430 (1971); *Vogler* v.

below denies such effective relief. It subjects rehired class 3 members, because of their inferior seniority status, to a variety of obstacles to full employment opportunities.[15]

The courts have not previously hesitated to modify seniority systems where necessary to eliminate the present effects of past discrimination as mandated by Section 706(g). In the line of cases fathered by *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1969), and *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970), the courts have required substitution of date-of-hire ("company" or "plant") seniority for unit seniority to allow segregated black employees equal access to jobs in formerly all-white units.[16] These decisions adopt employment date as a nondiscriminatory seniority standard not because it is *per se* valid but because it accomplishes the remedial purpose of Title VII. The instant case requires a different remedy under the same principles because of a crucial factual difference—the existence of an all-white workforce. See *Watkins* v. *United Steel Workers*

McCarty, Inc., 451 F.2d 1236, 1238 (5th Cir. 1971); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 243 (5th Cir. 1974); *Rock* v. *Norfolk & Western Ry. Co.*, 473 F.2d 1344 (4th Cir. 1973), *cert. denied* 412 U.S. 933 (1973). Cf. *Corning Glass Works* v. *Brennan*, 41 L.Ed.2d 1 (1974).

[15] Under the Respondents' collective bargaining agreement, choice of driving assignments and shifts, exposure to layoff during reduction-in-force, and rights to recall are controlled by OTR seniority.

[16] See, *e.g.*, *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652 (2nd Cir. 1971); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971), *cert. dismissed* 404 U.S. 1006 (1971); *United States* v. *Chesapeake & Ohio Ry.*, 471 F.2d 582 (4th Cir. 1972), *cert. denied* 411 U.S. 939 (1973); *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971), *cert. denied* 406 U.S. 906 (1972); *Head* v. *Timken Roller Bearing Co.*, 486 F.2d 870 (6th Cir. 1973); *United States* v. *N. L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973).

of America, Local No. 2369, 369 F. Supp. 1221, 1231 (E.D. La. 1974), and Cooper and Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1589, 1629 (1969) [hereinafter cited as Cooper and Sobol]. The denial of authority to grant such remedy places the decision below in conflict with the *Quarles-Local 189* line.[17]

Date-of-hire seniority is not a sacrosanct principle where it perpetuates discrimination. In cases involving union work-referrals, the courts have expressly rejected use of employment seniority or longevity of membership or service. Such seniority, they reason, is unavailable to black workers because of past policies of exclusion and therefore carries into the present the consequences of past discrimination. *United States* v. *Sheet Metal Workers, Local 36*, 416 F.2d 123, 131 (8th Cir. 1969);[18] *Dobbins* v. *Electrical Workers Local 212*, 292 F. Supp. 413 (S.D. Ohio 1968), *aff'd as later modified*, 472 F.2d 634 (6th Cir. 1973); *EEOC* v. *Plumbers, Local Union No. 189*, 311 F. Supp. 468, 474-476 (S.D. Ohio 1970), *vac'd on other grounds* 438 F.2d 408 (6th Cir. 1971), *cert. denied*, 404 U.S. 832 (1971). These decisions require referral of black employees despite their lack of longevity, and in effect modify the employ-

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[17] The ruling below brings an anomalous result. The most discriminatory employers, who like Bowman have totally excluded blacks, are subjected to less a complete remedy than other employers who have hired blacks into segregated units. Such a ruling places a premium on total resistance to law. See, *e.g.*, *Watkins* v. *United Steel Workers of America, Local No. 2369, supra*, 369 F. Sup. at 1229.

[18] The *Local 36* opinion reverses and expressly rejects a district court holding that the referral system was a non-discriminatory seniority system and therefore immune from revision, 280 F. Supp. 719, 728-730 (E.D. Mo. 1968). The Eighth Circuit agreed that a seniority system was at stake, but held it non-*bona fide* and unlawful, 416 F.2d at 133-134 and n. 20.

ment seniority system. The same modification was held beyond the Court's power in the instant case.

The opinion below conflicts with decisions involving promotional and layoff rights.[19] At least two courts have required modification of a layoff system based on date-of-hire seniority, where blacks had until recently been refused employment. In *Watkins* v. *United Steel Workers of America, Local No. 2369, supra,* 369 F. Supp. at 1226, the Court held that "employment preferences cannot be allocated on the basis of length of service seniority, where blacks were, by virtue of prior discrimination, prevented from accumulating relevant seniority." It therefore found layoff and recall practices based on actual hire date discriminatory under Title VII, *id.* at 1223. In *Jersey Central Power & Light Co.* v. *Electrical Workers, Local 327,* 8 EPD ¶9759 (D.N.J. 1974), the court held that a seniority clause based on employment date had to be accommodated to avoid prejudice to recently hired black employees in a reduction-in-force. Similarly, the courts have invalidated length-of-service as a factor in promotions, where blacks were previously denied hiring. *Rowe* v. *General Motors Corp.,* 457 F.2d 348, 358 (5th Cir. 1972) ("[the defendant] could not . . . treat the recently hired and governmentally twice emancipated Blacks as persons who once again had to go to the foot of the line"); *Allen* v. *City of Mobile,* 331 F. Supp. 1134, 1142-1143 (S.D. Ala. 1971), *aff'd per curiam* 466 F.2d 122 (5th Cir. 1972), *cert. denied* 412 U.S. 909 (1973) (holding use of service seniority credits unlawful); *Afro-American Patrolmen's League* v. *Duck,* 366 F. Supp. 1095, 1102 (N.D. Ohio 1973), *aff'd in pertinent part* 503

[19] This case did not present the layoff issue on its facts. However, the Fifth Circuit's broad holding would seem to exempt a "last hired, first fired" layoff system from modification without regard to its impact on black workers or its business justification.

F.2d 294 (6th Cir. 1974); *Harper* v. *Mayor and City Council of Baltimore,* 359 F. Supp. 1187, 1203-1204 (D. Md. 1973), *aff'd sub nom Harper* v. *Kloster,* 486 F.2d 1134 (4th Cir. 1973).

The holding below cannot be reconciled with any of the foregoing employment discrimination cases. In requesting retroactive seniority to the date when Class 3 members would have been hired but for discrimination, Petitioners merely seek to eliminate the present discriminatory impact of Respondents' seniority system on unlawfully rejected applicants.[20] The Court of Appeals rejected Petitioners' request because it viewed Section 703(h) as placing beyond remedy a seniority system founded on employment date. Yet none of the other decisions finds employment seniority *per se* consistent with Title VII,[21] and many expressly reject such seniority.

B. The Court of Appeals' decision also conflicts with labor law decisions of this Court which define the nature of appropriate relief under Section 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c). The conflict is particularly significant because Section 10(c) served as the

[20] Indeed this case is more compelling than the decisions involving use of seniority in work referrals, layoffs and recalls, or promotions. In those cases the beneficiaries of the courts' holdings had not themselves been rejected applicants; in the absence of discrimination they might not have personally obtained the position granted them by court order. Petitioners seek only restoration of the seniority rights they would have individually enjoyed if Respondents had not violated the law.

[21] The Court of Appeals' reliance on the rejection of "fictional seniority" in *Local 189,* 416 F.2d at 994-995, is misplaced. Judge Wisdom's dicta are addressed to the propriety of giving a remedy to persons whose rejection *before* enactment of Title VII was not then unlawful. Judge Wisdom also questioned whether remedies should be granted to new employees who were not themselves the victims of past discrimination. Neither of these problems is present in the instant case.

model for Title VII's remedial provision, Section 706(g), 42 U.S.C. § 2000e-5(g).[22]

This Court has consistently held in NLRA cases that a person unlawfully deprived of employment should be placed in the same position he would have occupied but for the unlawful discrimination. *N.L.R.B.* v. *Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969). A remedy that leaves him "worse off" is inadequate, *id; Golden State Bottling Co.* v. *N.L.R.B.*, 38 L. Ed. 2d 388 (1973), *aff'g* 467 F.2d 164, 166 (9th Cir. 1972). Thus, reinstatement to the full status that would have obtained absent discrimination, including full seniority, is appropriate and necessary relief for an employee discharged for protected union activities. *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 188 (1941), *Southport Co.* v. *N.L.R.B.*, 315 U.S. 100, 106 n.4 (1942); and for an economic striker illegally denied rehiring, *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 341, 348 (1938); *N.L.R.B.* v. *Transport Co. of Texas*, 438 F.2d 258, 264-266 (5th Cir. 1971).

Unlawfully rejected applicants for employment are entitled to no lesser remedy than dischargees and strikers. This Court has held:

> Experience having demonstrated that discrimination in hiring is twin to discrimination in firing, it would indeed be surprising if Congress gave a remedy for the one which it denied for the other. . . . To differentiate between discrimination in denying employment and in terminating it, would be a differentiation not only without substance but in defiance of that against which the prohibition of discrimination is directed.

[22] *United States* v. *Georgia Power Co.*, 474 F.2d 906, 921 n.19 (5th Cir. 1973); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 252 (5th Cir. 1974).

Phelps Dodge Corp. v. *N.L.R.B.*, *supra*, 313 U.S. at 188. Victims of unlawful hiring discrimination should therefore be reinstated on the same basis as those unlawfully discharged. See, *e.g.*, *Atlantic Maintenance Co.* v. *N.L.R.B.*, 305 F.2d 604 (3rd Cir. 1962), *enf'g* 134 NLRB 1328 (1961) (requiring reinstatement of rejected applicant with full seniority status); *N.L.R.B.* v. *Lamar Creamery Co.*, 246 F.2d 3, 10 (5th Cir. 1957), *enf'g* 115 NLRB 1113 (1956) (rejected applicant ordered reinstated "without prejudice to seniority"); *N.L.R.B.* v. *Cone Brothers Contracting Co.*, 317 F.2d 3, 7 (5th Cir. 1963).

The Fifth Circuit's decision under Title VII specifically prohibits the relief this Court deems vital under the NLRA. Under the doctrine announced below, a victim of racially motivated refusal to hire may *not* be reinstated to the position he would have held in the absence of discrimination. The district court could only order him reinstated to an inferior position of lower seniority standing. And discrimination in hiring would give rise to a lesser remedy than its "twin" discrimination in firing, when the discrimination is motivated by race or sex rather than union activities. The decision below carves out a special category of unlawful labor practices for persons illegally denied hiring because of race or sex and denies them a remedy available to all other victims of such practices.

C. Public policy sometimes requires individuals in protected categories to be given employment credit for time not actually worked on a job. Thus, Congress has enacted legislation that grants seniority or length-of-service credit to persons who were not employed but were engaged in military service. The Selective Training and Service Act of 1940, 50 U.S.C. App. §§ 301 *et seq.*, and the Selective Service Act of 1948, 50 U.S.C. App. §§ 451 *et seq.*, both required that an employee returning to a prior employer

from satisfactory military service be restored to his job "without loss of seniority," 50 U.S.C. App. § 459(c) (1967). See also, 5 U.S.C. § 3502(a) (1966) (federal employee competing for retention in reduction-in-force receives credit for time in military service).

In *Ford Motor Co.* v. *Huffman,* 345 U.S. 330 (1953), this Court held that the same policies expressed in the Selective Training and Service Act of 1940 authorized, as consistent with the National Labor Relations Act, the granting of seniority credit for military service *before* initial employment. *Huffman* rejected a challenge to a collective bargaining agreement provision that gave veterans seniority credit for service during World War II whether or not they were Ford employees before entering the service, 345 U.S. at 334-335 nn.6,7, *id.* at 339-340.[23] The Court, while relying on the strong public policy favoring employment of returning veterans, indicated that similar provisions would be appropriate for other national policy or public interest reasons, *id.* at 338-339. It specifically held that the NLRA does not require seniority to be based exclusively on dates of actual employment, holding,

> Nothing in the National Labor Relations Act, as amended, so limits the vision and action of a bargaining representative that it must disregard public policy and national security. Nor does anything in that Act compel a bargaining representative to limit seniority clauses solely to the relative lengths of employment of the respective employees.

Id. at 342. *Accord: Aeronautical Industrial District Lodge 727* v. *Campbell,* 337 U.S. 521 (1949) (Selective Service

[23] The Court noted that such seniority provisions were then "widespread," *id.* at 333.

and Training Act does not require that NLRA be construed to require date-of-employment as standard for seniority).[24]

The decision in the instant case would bar the district courts under Title VII from granting, as a remedy for discrimination, a measure that the NLRA clearly authorizes for bargaining representatives. Such a narrow view of Title VII is incompatible with the strong public policy —no less strong than that of assisting returning veterans—favoring effective relief to victims of employment discrimination.

III.

Neither the Statutory Language Nor the Legislative History Supports the Result Reached by the Court of Appeals.

The text of Section 703(h) does not clearly indicate any Congressional purpose to delimit remedies available under Section 706(g). Section 703(h) does not authorize or limit Title VII relief at all; it simply clarifies the prohibition of Section 703(a) against unlawful employer practices, by authorizing use of a "bona fide seniority or merit system." The statute does not define a "bona fide seniority system." In *Phelps Dodge Corp.* v. *N.L.R.B., supra,* this Court noted, "unlike mathematical symbols, the phrasing of such social legislation as this seldom attains more than approximate precision of definition," and therefore sought guidance in the broad legislative policy of the NLRA, 313 U.S. at 185. See also, *Golden State Bottling Co.* v. *N.L.R.B., supra,* 38 L.Ed.2d at 398. A

[24] As the Court noted there, to imply "that date of employment is the inflexible basis for determining seniority rights as reflected in layoffs is to ignore a vast body of long-established controlling practices in the process of collective bargaining. . . ." *Id.* at 527.

similar approach here militates against a restrictive reading of the vague provisions of Sections 703(h).

Every decision that construed Section 703(h) prior to the Court of Appeals decision herein had read the section's terms narrowly.[25] In the leading cases of *Quarles* v. *Philip Morris, Inc., supra,* 279 F. Supp. at 516-517, and *Local 189, United Papermakers and Paperworkers* v. *United States, supra,* 416 F.2d at 995-996, the courts reasoned that a seniority system which carries forward the effects of past discrimination is by definition not "bona fide". Both courts noted that the Section 703(h) exemption is expressly inapplicable to seniority systems which cause differences resulting from "an intention to discriminate because of race," and that prior hiring discrimination is such an "intentional" act, see *Quarles,* 279 F. Supp. at 519; *Local 189,* 416 F.2d at 996.[26]

The legislative history reveals no Congressional intention that Section 703(h) should limit the scope of Section 706(g). Congress attached no such limitations when it adopted the remedial provisions of Section 706(g).[27] And all indicia of purpose show that Congress intended no additional restrictions when it added Section 703(h) to Title VII as a late amendment. For a full discussion, see

[25] Subsequently, the United States Court of Appeals for the Seventh Circuit, in *Waters* v. *Wisconsin Steel Works of International Harvester Co.,* 503 F.2d 1309 (August 26, 1974), reached the same legal conclusion as the Fifth Circuit. *Waters* is, however, distinguishable. It involves the layoff/recall rights of an employee whose application was discriminatorily rejected *before* Title VII became effective.

[26] *Accord: United States* v. *Bethlehem Steel Corp., supra,* 446 F.2d at 661-662; *United States* v. *Chesapeake & Ohio Rwy. Co., supra,* 471 F.2d at 587-588; *United States* v. *Sheet Metal Workers, Local 36, supra,* 416 F.2d at 133-134 and n. 20.

[27] On the contrary, Congress has expressed its understanding that Section 706(g) authorized broad remedies, see p. 10, *supra.*

Cooper and Sobol, *supra,* at 1610-1614. There was no Congressional discussion, after the introduction of the amendment, of what constitutes a "bona fide seniority system," *id.* at 1610-1611, 1613.[28]

The limitation imposed by the Court of Appeals is therefore judge-made. The Court of Appeals erroneously engrafted a limitation on Section 706(g) from an unrelated provision. The Court of Appeals' construction of Section 703(h) as a limiting remedial provision is particularly inappropriate since it would undo much of what Congress hoped to accomplish in providing for broad and flexible remedies. See Cooper and Sobol, *supra,* at 1614.

IV.

The Court of Appeals Decision Conflicts With Authorities Holding That Title VII Does Not Limit Remedies Available Under 42 U.S.C. §1981.

The Court of Appeals ignored Petitioners' cause of action under the Civil Rights Act of 1866, 42 U.S.C. § 1981. The Court correctly assumed that Petitioners were entitled to relief on that separate basis (A 9, A 39),[29] but

[28] Petitioners suggest that a "bona fide seniority system" within the correct meaning of the Act would be one which measures not mere longevity but rather skill or ability necessary to efficient job performance. This reading of the section is supported by its reference to "merit" and "quantity or quality of production". *Cf. Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971). The decision below forecloses seniority relief to rejected applicants without regard to whether, in a particular case, seniority might be related to job performance.

[29] Although this Court has not yet specifically ruled on the question (but see, *Johnson* v. *Railway Express Agency, Inc.,* O.T. 1974, No. 73-1543), Section 1981 is now universally accepted as an independent basis for employment discrimination actions. See, *e.g., Macklin* v. *Spector Motor Freight Systems, Inc.,* 478 F.2d 979, 993-994 (D.C. Cir. 1973); *Guerra* v. *Manchester Terminal Co.,* 498 F.2d 641, 654 (5th Cir. 1974); and cases cited therein.

did not draw the logical consequences. Section 703(h) cannot limit remedies based on laws other than Title VII, *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F.2d 159, 172 (3rd Cir. 1971), *cert. denied* 404 U.S. 854 (1971). The same reasons for rejecting Section 703(h) as a limitation on Title VII relief apply even more forcefully to the Section 1981 remedy; the latter section is a separate statute enacted a century earlier. *Cf. Watkins* v. *United Steel Workers, Local No. 2369, supra,* 369 F. Supp. at 1230-1231.

This Court has stated that in adopting Title VII, Congress did not intend to limit the scope or effectiveness of pre-existing remedies for employment discrimination, including Section 1981, *Alexander* v. *Gardner-Denver Co.,* 39 L.Ed.2d 147, 158 (1974). While considering the 1972 Amendments to Title VII, the Senate twice rejected an amendment that would have made Title VII the exclusive remedy for employment discrimination, Cong. Rec. S. 1526 (daily ed. February 9, 1972), Cong. Rec. S. 1797 (daily ed. February 15, 1972). The Report of the Senate Committee on the amendments specifies that none "of the provisions of this bill are meant to affect existing rights granted under other laws," S. Rep. No. 415, 92d Congress, 1st Session (1971), p. 24. This Court has reached a similar conclusion as to the effect of the Fair Housing Act of 1968, 42 U.S.C. §§ 3601 *et seq.,* on the sister statute of Section 1981. In *Jones* v. *Mayer Co.,* 392 U.S. 409, 417 n. 20 (1968), it held that that Act "does not mention 42 U.S.C. § 1982, and we cannot assume that Congress intended to effect any change, either substantive or procedural, in the prior statute. See *United States* v. *Borden Co.,* 308 U.S. 188, 198-199 [1939]." By the same logic, Section 703(h) cannot bar Petitioners from full seniority relief based on Section 1981.

CONCLUSION

The Court should grant a Writ of Certiorari to review the judgment and opinion of the Court of Appeals.

Respectfully submitted,

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APPENDIX

Decision of the United States Court of Appeals for the Fifth Circuit

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FRANKS v. BOWMAN TRANSP. CO.

Appeal from the United States District Court for the Northern District of Georgia.

Before THORNBERRY, AINSWORTH and RONEY, Circuit Judges.

THORNBERRY, Circuit Judge:

After processing a complaint through the EEOC, appellant Franks brought this racial-discrimination civil rights suit under Title VII, § 706, of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e–5, and under 42 U.S.C.A. § 1981 on behalf of himself and those similarly situated against his former employer, Bowman Transportation Company, and his union.[1] He alleged a discriminatory refusal to promote and a discriminatory discharge, and he sought extensive declaratory and equitable relief for himself and for class members. Lee was permitted to intervene as plaintiff to press his individual claim against Bowman for a discriminatory refusal to hire and for a discriminatory discharge and to represent other classes of black Bowman employees and job applicants. The district court found after a three-day trial that Franks had established the factual bases for his individual claim, but it dismissed his individual action because it concluded Franks had waited beyond the applicable limitations period to file suit. The court held that Lee factually established his claim for a discriminatory refusal to hire, but failed to prove his claim for discriminatory discharge, and it accordingly entered judgment partly for him and partly against him. As to the classes represented, the court found that past racial discrimination had been demonstrated and that the departmental seniority

1. International Union of District 50, Local No. 13600, Allied and Technical Workers of the United States and Canada. Also included as a party defendant was the national union of which Local 13600 is a part, International Union of Allied and Technical Workers of the United States and Canada.

system maintained by Bowman and the union perpetuated the effects of past discrimination. As a remedy, the court enjoined Bowman from discriminating along racial lines in the future, ordered that certain class members be allowed to utilize company seniority accumulated before the date on which discrimination had ceased, and afforded certain discriminatees who responded to a notice from Bowman within thirty days priority in consideration for employment. The court declined to grant further affirmative relief requested, including the use of full company seniority for certain discriminatees, measures to ensure hiring and training of greater numbers of blacks in the future, and a requirement that Bowman file periodic reports with the district court to demonstrate compliance.

On this appeal we are asked to review the district court's adverse rulings on the individual claims of Franks and Lee and to determine whether the district court abused its discretion in not affording greater affirmative relief to the classes they represented. We shall discuss the pertinent facts in connection with the various claims.

I. Franks' Individual Claim: Limitations and Laches

Bowman is an interstate trucking company which operates as a common carrier licensed by the Interstate Commerce Commission throughout southeastern United States and in parts of the mid-west.[2] Its principal terminals are in Atlanta, Birmingham, Charlotte, and Richmond.

Franks, a Negro, was first hired at Bowman's Atlanta terminal in 1960 as a "tire man,"—a position which requires the most menial work at the terminal and brings the lowest pay. Except for a one-year period in 1961 and 1962 during which he was assigned as a "grease man," Franks worked as a tire man continuously until 1965, when he resigned due to an

2. Bowman's operations and procedures are described more fully at the beginning of part III of this opinion, *infra*.

injury. In 1966 he was rehired as a tire man. After his return Franks attempted on several occasions to obtain a transfer, or promotion, into another job, but his way was blocked by Bowman's racially discriminatory policy of employing blacks only in the Tire Shop.[3] Although Bowman agreed in a collective bargaining agreement signed in 1967 to allow transfers and to hire without regard to race, the discriminatory policy was in fact continued in effect unofficially after 1967. Both before and after 1967 Franks was told that blacks could not transfer, or be promoted, from the Tire Shop. The district court found that but for Bowman's discriminatory policy, Franks should reasonably have been promoted to a higher paying, "dock worker" position by the end of 1967. No challenge is made to this finding.

Having watched white workers hired "off the street" into higher paying positions for which he was qualified and had applied, Franks filed a complaint with the Equal Employment Opportunity Commission on March 25, 1968, charging that Bowman refused to promote him because of its racially discriminatory policy of employing blacks only in the Tire Shop. EEOC officials visited the Atlanta terminal on two occasions, on April 23, 1968 and on May 10, 1968 to investigate Franks' charges. A few hours after the second visit Bowman discharged Franks, assertedly for "unauthorized bobtailing," or using company vehicles for personal errands. The district court rejected this purported explanation, however, and found that Franks was discharged "for reasons of race." On May 13, 1968 Franks filed a second complaint with the EEOC, alleging a discriminatory discharge.

Efforts to resolve the dispute through conciliation having failed, on March 21, 1969 Franks' then attorney requested the EEOC to issue a § 706(e) "suit letter" covering both complaints, and such a letter was sent on the same day to Franks' mailing address by certified mail, return receipt requested.

3. Two blacks who worked as "cleanup men" in the Trailer Shop were exceptions.

Franks resided at 5339 Victory Drive in Morrow, Georgia, but he received his mail at 5319 Victory Drive, where his grandmother, sister, and nine-year-old nephew resided. On March 22 his nephew received the letter and signed the postal receipt, but he lost the letter before delivering it to Franks. Franks learned that his nephew had signed for some letter, but he never saw or received the letter personally. About a year later, on March 20, 1970 Franks contacted EEOC officials again about his dispute with Bowman, and, upon being shown the postal receipt for the first suit letter, affirmed in an affidavit that he had not personally received it. Franks then retained his present attorneys and filed "amended" charges with the EEOC which substantially duplicated the earlier charges. A second suit letter issued on April 14, 1971, and Franks filed a suit less than a month later on May 5, 1971.

On these facts the district court held Franks' Title VII and his Section 1981 claim barred. As to the Title VII action, the court reasoned that the thirty-day statutory limitations period [4] began to run on March 22, 1969, the date the first suit letter was delivered to Franks' mailing address, so that the action was barred after April 21, 1969. As to the § 1981 action, the court concluded that a two-year Georgia statute of limitations was applicable and that it barred the claim since the suit had not been filed for almost three years after Franks' discharge on May 10, 1968.

[1] The statutory language which established the thirty-day limitations period applicable to Franks' Title VII action is found in § 706(e) as it read before the 1972 amendments: [5]

> If within thirty days after a charge is filed with the Commission [or within sixty days, if the Commission acts to extend the period] the Commission has been unable to obtain voluntary compliance with this subchapter, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter be brought against the respondent named in the charge (1) by the person claiming to be aggrieved. . . .

4. The 1972 amendments to the Civil Rights Act of 1964, P.L. 92-261 § 14, 86 Stat. 113, extended the limitations period from thirty days to ninety days.

5. *See* note 4 *supra*.

The key word in the statute is "notify"; the limitations period begins to run upon notification of the aggrieved party.[6] This Court has held that such notification takes place only when "notice of the failure to obtain voluntary compliance has been sent *and received.*" Miller v. International Paper Co., 5th Cir. 1969, 408 F.2d 283 (emphasis added). There being no question that the EEOC mailed the statutory notice to Franks, the Title VII limitations issue must be framed in terms of whether Franks constructively "received" the letter, even though it never actually came into his hands. We hold that Franks did not "receive" the first suit letter, and that the thirty-day limitations period began to run only when the second suit letter actually reached him or his attorney. Genovese v. Shell Oil Co., 5th Cir. 1973, 488 F.2d 84. Since suit was filed within thirty days of the receipt of the second suit letter, the Title VII action was not barred by the § 706(e) limitations period.

We do not deal here with service of process or receipt of an offer or acceptance to make a contract, but with the interpretation of Title VII. The courts have consistently construed the Act liberally to effectuate its remedial purpose, and we think this purpose would be poorly served by the application of a "constructive receipt" doctrine to the notification procedure. More narrowly, the purpose of the statutory notification, which is "to provide a formal notification to the claimant that his administrative remedies with the Commission have

6. The statute does not establish an aggregate ninety-day limitations period (*i. e.*, the aggregate of the maximum sixty-day conciliation period and the thirty-day right-to-sue period) which begins to run on the date the charge is filed. Miller v. International Paper Co., 5th Cir. 1969, 408 F.2d 283. The statute does not specify any certain limit on the time which may pass between the expiration of the conciliation period and the statutory notification, which starts the thirty-day period. *See id.*; *see also* 29 C.F.R. § 1601.25a.

been exhausted," Beverly v. Lone Star Lead Construction Corp., 5th Cir. 1971, 437 F.2d 1136, and to inform him that the thirty-day period has begun to run, has not been accomplished unless the claimant is actually aware of the suit letter. In terms of the policy behind limitations periods generally, the claimant can hardly be said to have slept on his rights if he allows the thirty-day period to expire in ignorance of his right to sue.

Our holding that the statutory notification is complete only upon actual receipt of the suit letter accords with the view we have expressed in prior cases that Congress did not intend to condition a claimant's right to sue under Title VII on fortuitous circumstances or events beyond his control which are not spelled out in the statute. Thus, in Beverly v. Lone Star Lead Construction Corp., supra, we concluded that the EEOC's failure to find reasonable cause to suspect a Title VII violation was not a jurisdictional barrier to a claimant's Title VII suit because Congress did not intend to make a claimant's statutory right to sue subject to "such fortuitous variables as workload, mistakes, or possible lack of diligence of EEOC personnel." *Id.* at 1140. Similarly, in Dent v. St. Louis-San Francisco Railway Co., 5th Cir. 1969, 406 F.2d 399, we held that the EEOC's failure to attempt to effect voluntary conciliation did not bar a Title VII suit because a claimant's right to sue was not dependent on acts or omissions of the EEOC which were "beyond the control of the aggrieved party." *Id.* at 403. In this case we are not confronted with any delay or mistake on the part of the EEOC, but with the loss of the first suit letter by Franks' nine-year-old nephew. This loss must be characterized as a fortuitous event, however, just as loss of the letter in the EEOC office before mailing or loss by the postal department would have been.

[2] As an evidentiary matter, a district court might properly consider the mailing of a suit letter and the receipt showing proper delivery as prima facie evidence that the notice had reached the addressee. Where, however, it is

shown that the claimant through no fault of his own has failed to receive the suit letter, and the district court has so found, as in this case, the delivery of the letter to the mailing address cannot be considered to constitute statutory notification.

[3] Our conclusion that Franks' Title VII is not barred does not end the matter, for special limitations considerations apply to that aspect of the Title VII action which seeks back pay. First, the proper limitations statute must be selected and applied. Under the borrowing principle of Beard v. Stephens, 5th Cir. 1967, 372 F.2d 685, when an action is brought for back pay or similar damages under a federal statute which contains no built-in limitations period, the federal district court must apply the statute of limitations of the state where it sits which would be applicable to the most closely analogous state action. The instant case was brought in a Georgia federal court. We have held in a recent case that the Georgia statute governing a back pay award in a § 707 pattern or practice suit brought by the Attorney General or in a § 706 private action such as the instant one, is Ga.Code § 3–704,[7] which prescribes a two-year limitations period for actions to recover wages, overtime, and damages due under statutes respecting the payment of wages. United States v. Georgia Power Company, 5th Cir. 1973, 474 F.2d 906, 924. Under the Georgia Power case, then, it is clear that the two-year statute applies.

[4] For Franks' individual claim the statute began running on the date of his dismissal May 10, 1968. The running of the limitations period was tolled by the filing of a complaint with

7. Section 3–704 reads in pertinent part:
All suits for the enforcement of rights accruing to individuals under statutes, acts of incorporation, or by operation of law, shall be brought within 20 years after the right of action shall have accrued: Provided, however, that all suits . . . for the recovery of . . . wages and overtime, subsequent to March 20, 1943, shall be brought within two years after the right of action shall have accrued.

the EEOC on May 13, 1968, three days later, and it remained tolled "during such time as the processes of agency reconciliation are at work and until notification to the complainant that voluntary compliance cannot be obtained." United States v. Georgia Power Co., *supra* at 925. As we have indicated above, the notification was not ultimately made until the second suit letter was received on April 14, 1971. On this date the limitations period began running again and continued to run for twenty-one days, until suit was filed on May 5, 1971. Thus the limitations period ran for a total of less than one month, far less than the two year limitations period, before the suit was filed.

Under the same borrowing principle of Beard v. Stephens, *supra*, we conclude that Ga.Code § 3–704 applies to Franks' action under § 1981. The first sentence of that section providing a twenty-year period for "all suits for the enforcement of rights accruing to individuals under statutes . . . ", plainly did not bar Franks' § 1981 action. The proviso of the § 3–704 prescribing a two-year period for suits to recover wages applies to the § 1981 action in the same way as to the Title VII action. The running of the limitations period was tolled during the period between the filing of the May 13, 1968 complaint with the EEOC and the receipt of the second suit letter on about April 14, 1971.

[5] One further matter relating to the time suit was filed remains to be considered, and that is the applicability of the doctrine of laches. Title VII empowers the federal district court to

> enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include . . . reinstatement or hiring of employees, with or without back pay. . . .

§ 706(g), 42 U.S.C.A. § 2000e–5(g). Thus, the action and the relief authorized are essentially equitable in nature. This is

true not only of traditional injunctive relief which may be granted, but also of the back pay award.

> The demand for back pay is not in the nature of a claim for damages, but rather is an integral part of the statutory equitable remedy, to be determined through the exercise of the court's discretion, and not by a jury.

Johnson v. Georgia Highway Express, Inc., 5th Cir. 1969, 417 F.2d 1122. The § 1981 action, insofar as it corresponds to the Title VII action, must also be considered essentially equitable. In an equitable action, equitable defenses may be raised, and these include the doctrine of laches. In the proper case, laches might be applied to bar a claim entirely, or it might bar only part of the remedy sought, such as the back pay award or a portion of it. *See* United States v. Georgia Power Co., *supra* at 923. We do not intimate any view as to the applicability of laches to this case, for the district court should make such a determination in the first instance.

[6] Our holding that Franks' individual claim was not barred by limitations necessitates reversal of that portion of the district court's judgment dismissing it. Since the question of Franks' tardiness in initiating suit was called to the attention of the district court, on remand it should specifically consider the applicability of laches.[8] Subject to its determination as to the applicability of the doctrine of laches, the district court should enter judgment for Franks and fashion an appropriate remedy, since it has already found that he established the factual bases of his claim.

II. Lee's Individual Claim: Significance of Arbitration Award

Lee, a Negro with seven years' experience as a truck driver and an excellent driving record, originally applied to Bowman

8. Appellants contend that the issue was not adequately raised below. When the issue of tardy filing was brought sufficiently to the attention of the court to be the ground for its ruling, however, we think it must be considered to have been adequately raised.

for a driving job in January of 1970, but he was not hired, the district court found, because of his race. Upon learning that a white driver had been hired shortly after his rejection, Lee filed a complaint with the EEOC on February 26, 1970, charging a racially discriminatory refusal to hire. In response to the charge and to pressure from the Office of Federal Contract Compliance, Lee was hired on September 18, 1970 at the Birmingham terminal as one of Bowman's first black over-the-road truck drivers.

After working as a model employee for several months, Lee was discharged on March 18, 1971. The facts surrounding his discharge have been in dispute throughout this litigation. When Lee brought his truck to the Bowman garage which serves the Birmingham area, a "stinger" was found in the fuel pump of his engine. A stinger is a wooden peg used to override the engine's governor, the device which limits the maximum revolutions per minute and thereby the truck's maximum speed. Bowman claims that it discharged Lee because of the stinger in his truck's engine under a firm, long-standing company policy requiring discharge of any employee whose fuel pump has been altered. Lee denies any fuel pump tampering and stresses the opportunities of others, including Bowman's white mechanics, to plant the stinger for reasons of racial prejudice.

Lee's discharge was submitted to binding arbitration under contractual grievance procedures and on October 25, 1971 an award favorable to Lee resulted. The arbitrator found that although the "facts raise[d] a strong inference approaching a presumption in the Company's favor," there was a "failure of proof" because the possibility of fuel pump tampering by other employees was not adequately eliminated. Reinstatement and back pay for one month, the maximum allowable under the collective bargaining agreement, were ordered. Bowman sent the back pay to Lee, and tendered reinstatement in his old Birmingham-based job on October 29, 1971. Lee refused to accept reinstatement at Birmingham, however,

and demanded a transfer to Atlanta and back pay for all months from the time of his discharge. Bowman refused to comply with these demands, and the district court found that this refusal was not racially motivated.

Independently of the grievance procedures under the collective bargaining agreement Lee filed a second complaint with the EEOC on March 19, 1971, charging a discriminatory discharge. Lee's first EEOC charge, it will be recalled, was for the discriminatory refusal to hire. On June 22, 1971, Lee received a suit letter authorizing a Title VII action because of the discriminatory refusal to hire, and on July 12, 1971, he received another suit letter with respect to the alleged discriminatory discharge. He filed a timely motion to intervene in Franks' suit and was subsequently permitted to intervene on behalf of himself individually and other similarly situated black Bowman employees and job applicants. Lee's complaint invoked the court's jurisdiction under both Title VII and § 1981, as did Franks' original complaint.

The district court found for Lee with regard to the original refusal to hire and awarded him a total of $6,124.58 in back pay. No appeal is taken from this part of the district court's judgment.

[7] In view of the undisputed fact that a stinger was found in Lee's truck and in light of Bowman's mandatory discharge policy for fuel pump tampering, the district court found that Lee failed to prove his discharge was racially motivated. On the basis of the evidence before it, it determined:

> The mandatory discharge rule for alteration of the fuel pump is one of long-standing. Between 1967 and trial, there were some 30 terminations or permitted resignations for violation of this rule. Some of the discharged drivers had received prior warnings for violations or other company rules not leading to mandatory discharge; but some, like Lee, had no prior warnings and possessed clean records at the time. There was no requisite of previous offense to the

discharge. Most significantly, there is no indication and no evidence that any other driver, Black or white was ever NOT discharged for violation of the standing rule. It is concluded that race was not a factor in the discharge of the intervenor Lee.

Appellant Lee challenges as clearly erroneous the district court's finding that the discharge was not racially discriminatory. Although the facts surrounding the discovery of the stinger leave ample room for suspicion that the fuel pump was altered by another employee besides Lee, on the record before us we cannot hold the district court's determination clearly erroneous.

[8, 9] The primary basis for Lee's factual attack is his contention that the district court erred in failing to give greater weight to the arbitration award in his favor in making its findings.[9] We cannot agree. The federal court is the final arbiter in cases involving Title VII rights, and "the arbitrator's determination under the contract has no effect on the court's *power* to adjudicate a violation of Title VII rights." Hutchings v. United States Industries, Inc., 5th Cir. 1970, 428 F.2d 303, 313 (emphasis in original). Invoking contractual grievance procedures does not constitute an election of remedies which automatically bars a Title VII claimant from the court, and an arbitration award cannot be pleaded as a defense to a Title VII suit under the doctrine of res judicata. *See id.* at 314; Rios v. Reynolds Metals Co., 5th Cir. 1972, 467 F.2d 54; Bowe v. Colgate-Palmolive Company, 7th Cir. 1969, 416 F.2d 711, 715.

[10] To be sure, arbitration awards and grievance determinations "may be properly considered as evidence" in a Title VII case to the extent they are relevant to the questions before the court. Hutchings v. United States Industries, Inc., *supra* at 314 n. 10. And when the same issues are presented

9. The district court concluded: "The court is not bound by the arbitration award in any way. . . . This is especially true where race was given no consideration by the arbitrator."

in arbitration as in a Title VII lawsuit, the court has discretion under certain circumstances to defer to the award, just as the National Labor Relations Board may in a case properly before it defer to an arbitrator's determinations. *See* Lodge No. 12, District No. 37, International Association of Machinists v. Cameron Iron Works, Inc., 5th Cir. 1958, 257 F.2d 467, 473. We have recently had occasion to delineate in some detail the circumstances under which such discretionary deference by a court is proper:

> We hold that the federal district court in the exercise of its power as the final arbiter under Title VII may follow a like procedure of deferral [i. e., a procedure like that of the NLRB] under the following limitations. First, there may be no deference to the decision of the arbitrator unless the contractual right coincides with rights under Title VII. Second, it must be plain that the arbitrator's decision is in no way violative of the private rights guaranteed by Title VII, nor of the public policy which inheres in Title VII. In addition, before deferring, the district court must be satisfied that (1) the factual issues before it are identical to those decided by the arbitrator; (2) the arbitrator had power under the collective bargaining agreement to decide the ultimate issue of discrimination; (3) the evidence presented at the arbitral hearing dealt adequately with all factual issues; (4) the arbitrator actually decided the factual issues presented to the court; (5) the arbitration proceeding was fair and regular and free of procedural infirmities.

Rios v. Reynolds Metal Company, *supra* at 58.

[11] In this case it is clear that complete deference to the arbitration award would have been improper. The contractual issue presented to the arbitrator was whether the company proved, under a "strict proof" standard, that Lee had tampered with the fuel pump, and not whether the discharge was for racial reasons. The contractual right not to be dismissed unless "cause" could be demonstrated was not identical to the Title VII not to be discharged for reasons of race. Further,

the arbitrator's finding could be of little if any evidentiary value. A finding that the stinger in the fuel pump was not Bowman's real reason for discharging Lee would have had an important bearing on the question of racial motivation presented to the court, but the arbitrator made no such finding. Rather, the arbitrator found only that the company failed to prove fuel pump tampering, and did not deal with Bowman's motivation. In arriving at this finding, the arbitrator imposed on the company the burden of proof, and it evaluated the evidence under a "strict" standard of proof, under which "reasonable doubts should be resolved in favor of the grievance." Thus, in the final analysis, the arbitrator determined only that the company's asserted basis for the discharge—that Lee had tampered with the fuel pump—was not demonstrated beyond a reasonable doubt. This finding could be of little value to Lee in carrying his burden of proving racial motivation at trial or to the district court in resolving the factual issues before it. It did not err or abuse its discretion in failing to give greater weight to the arbitration award.

Accordingly, the judgment of the district court insofar as it relates to Lee's individual claim is affirmed.

III. Adequacy of Relief to the Class

Appellants argue that the record in this case calls for further affirmative relief to the class of discriminatees, beyond that granted in the injunction of the district court. Specifically, they seek (1) allowance of full company seniority for employees who have been discriminated against, (2) the temporary use of a mathematical formula to ensure the hiring of more black over-the-road drivers in the future and the ordering of public recruitment for black over-the-road drivers and for black office workers, (3) mandatory training programs to upgrade the skills of black employees and applicants, and (4) retention of jurisdiction by the district court to ensure compliance. Additionally, appellants contend the district

court abused its discretion in refusing to award back pay to non-named class members. We are compelled to agree that further relief in some respects is required, as we indicate below.

A. Bowman's Operations and Policies

Bowman is an interstate trucking business with its main terminals located in Atlanta, Birmingham, Charlotte, and Richmond. Its employees fall into four categories: (1) the over-the-road (OTR) drivers, (2) city drivers and dock workers, (3) Maintenance Department workers (including employees in the Tractor Shop, the Trailer Shop, and the Tire Shop), and (4) office, sales, and clerical employees. Employees in the first three categories belong to the union, and the organizational lines separating them are established in the collective bargaining agreements between Bowman and the union. The office and clerical employees are not unionized, but, the district court found, "in essence [they] constitute another department at each terminal." The OTR drivers are the long-distance truck drivers; they number four hundred to five hundred company-wide, and they earn the highest wage paid to non-management employees. The city drivers, of whom about fifty are employed at the Atlanta terminal, drive trucks on local missions at the respective terminals, and the one hundred fifty to two hundred dock workers perform the manual labor of loading and unloading trucks. The city drivers and dock workers are at the middle of the wage scale. Within the Maintenance Department, which has about one hundred twenty employees in Atlanta, the jobs in the Tire Shop require the most menial work and bring the lowest pay, while the Tractor Shop and the Trailer Shop jobs require mechanical skill and pay more. Each terminal is a hiring center for OTR drivers, who operate system-wide, as well as for other categories of employees, whose work is localized at the terminal. In its class aspects, this suit involves all OTR drivers throughout

Bowman's system, and employees in the other three categories at the Atlanta terminal only.

Before 1968 Bowman followed a conscious policy of keeping its employees segregated according to race. With the exception of two black "cleanup men" in the Trailer Shop, blacks were employed only in the Tire Shop.[10] This was the only

10. The district court found that the following chart represented accurately the distribution of jobs according to race at the times indicated:

Dept./Job	July, 1965 Blacks	July, 1965 Whites	March, 1968 Blacks	March, 1968 Whites	August, 1971 Blacks	August, 1971 Whites
Office & Managerial	0	23	0	27	0	42
Sales Personnel	0	6	0	5	0	5
Office/Clerical	0	27	0	63	0	53
Ship Parts Clerk	0	8	0	9	0	9
Over-the-Road Drivers						
Atlanta Terminal	0	360	0	361	0	230
All Other	0	55	0	103	11	269
TOTAL	0	415	0	464	11	499
City Driver/ Dock Jobs						
City Drivers	0	79	0	80	3	81
Checkers	0	23	0	127	4	103
Dock Workers	0	84	0	94	6	60
TOTAL	0	186	0	301	13	244
Shop Workers						
Mechanics	0	70	0	92	0	63
Trailer Shop	-	-	-	-	0	36
Grease/Oil Men	0	6	0	8	0	4
Tire Shop	7	1	9	3	16	2
Clean-up Men	-	-	1	1	4	0
Janitors	0	1	0	2	1	1
TOTAL	7	78	10	106	21	106
TOTAL EMPLOYEES	7	743	10	1025	45	958

subdivision into which blacks were hired, and transfer to other shops within the Maintenance Department or to other departments was not permitted. The Tire Shop had predominantly black employees and white supervisors. Since August 1968 Bowman has hired a few blacks into the previously all-white OTR and City Driver and Dock Departments, but as of the time of trial in March of 1972 it had not hired any blacks into the higher paying mechanic jobs in the Maintenance Department or as office or clerical workers.

Before 1967 Bowman prohibited interdepartmental transfers flatly. The collective bargaining signed in 1967 eliminated Bowman's no-transfer policy and opened the way for nonracial hiring in all departments, but the agreement continued to recognize departmental seniority. The district court found that the maintenance of the departmental seniority "effectively penalized any Senior Blacks wishing to transfer to a previously all-white department in favor of junior whites already employed there."

The first black was hired into the previously all-white City Driver and Dock Department on August 15, 1968.

Despite the collective bargaining agreement provision mandating hiring without regard to race, Bowman maintained until September of 1970 a conscious unwritten policy of not hiring blacks as OTR drivers. The apparent source of the resistance to change in this department was the unwillingness of the white drivers to "ride double" with blacks to train them for the job or to share bunk and shower facilities with them on the road. In 1970 the company began receiving greater numbers of applications from blacks for OTR jobs. Under pressure from the Office of Federal Contracts Compliance to hire OTR drivers without regard to race, and partly in response to the EEOC charge filed by appellant Lee, Bowman hired its first OTR driver on September 11, 1970. For about a year black OTR drivers were hired only at the Birmingham terminal, where Bowman housed them in separate facilities.

Other black OTR drivers were first hired in Richmond on September 12, 1971, in Atlanta on November 21, 1971, and in Charlotte on February 15, 1972. The record reflects that Bowman has been hiring black OTR drivers at a sharply decreasing rate since the first hirings in September of 1970 under pressure. During the last four months of 1970, ten of the thirty-six new OTR drivers hired, or 28%, were black. During the twelve months of 1971, thirteen of one hundred one, or 12%, of the new OTR drivers were black. In the first two months of 1972, immediately before trial, Bowman hired fifty OTR drivers, only four of whom, or 8%, were black. On February 26, 1972, one month before trial 3.3% of the total number of OTR drivers employed by Bowman were black.[11]

The provision of the 1967 collective bargaining agreement abolishing the no-transfer rule and requiring hiring without regard to race has had no effect in the Maintenance Department. Bowman has never hired a black mechanic in the Tractor Shop or in the Trailer Shop, either "off the street" or as a transfer from the Tire Shop. Bowman has not hired a black as a "grease man" since that position became a training step to the mechanic positions. When blacks have attempted to transfer from the Tire Shop to better jobs in the Maintenance Department, management has discouraged the move by informing the transfer-aspirant that he must resign for a period of six weeks and then reapply, or simply that transfers are not permitted. Further, although any Maintenance Department employee may theoretically use his full departmental seniority in bidding on any Maintenance Department

11. The 3.3% figure is taken from a seniority list supplied by Bowman shortly before trial. The district court found that "some 10%" of the OTR drivers were black at the time of trial, but it did not indicate the source of this later statistic. Finding no basis in the record for the 10% figure, we believe it must be the result of an oversight, and we accept appellants' unanswered contention that it is clearly erroneous. In the absence of some evidence showing a drastic increase in the percentage of black OTR drivers in the last month before trial, the figure must be considered to have been about 3.3% at the time of trial.

job, inter-shop transfer attempts by seniority bidding are largely prevented by the expedient of posting job openings only in the shop where they occur, so that employees in the other shops remain ignorant of them. For example, an opening in the Tractor Shop would be posted only in the Tractor Shop area, so that Tire Shop employees with seniority would not become aware of it and thus have a meaningful opportunity to bid for it.

At the time of trial Bowman had never hired a black office worker at the Atlanta terminal. Clerical job vacancies are not advertised publicly, but are communicated by current clerical employees to acquaintances by word of mouth. Only three or four blacks applied for clerical positions in the five years preceding trial. Until spring of 1971 Bowman used the race-oriented Wonderlic test to screen clerical job applicants and it rejected two black applicants on the basis of the scores obtained.[12]

The district court found that Bowman had not practiced racial discrimination in hiring office and clerical workers.[13]

12. The use of the Wonderlic test to screen job applicants was held to constitute prohibited racial discrimination in Griggs v. Duke Power Co., 1971, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 because it yielded significantly different results for whites and blacks and was not shown to produce job-related information. Bowman has made no attempt to show that the Wonderlic test results were related to the requirements of its clerical jobs.

13. The district court's findings with regard to the office and clerical workers were as follows:

> The office employment situation stays rather stable and although there is a substantial number of applicants each year, the hiring rate is very low. In the past five years, there have only been a total of three or four Black applicants out of an average of 25 each year. Each of these applicants has been treated no differently from any other applicant and race has not been a factor in the employment policies in the office. At time of trial, one Black applicant has been deemed qualified and is waiting for an opening. There simply has been little interest by Blacks in clerical positions at this company and no evidence is produced of racial discrimination in this department.

With regard to the OTR drivers, dock workers and city drivers and Maintenance Department employees, it found that, while discriminatory policies had existed in the past, they had, by the time of trial, given way to "an official policy against discriminatory hiring in all of its [Bowman's] hiring practices." The departmental seniority system, however, perpetuated the effects of past discrimination.

B. Relief Granted by the District Court

The district court's order defining the classes represented and granting injunctive relief reads as follows:

> In accordance with the findings of the Court, the defendant, BOWMAN TRANSPORTATION COMPANY, and the defendants, INTERNATIONAL UNION OF DISTRICT 50, LOCAL NO. 13600, ALLIED AND TECHNICAL WORKERS OF THE UNITED STATES AND CANADA, and INTERNATIONAL UNION OF DISTRICT 50, ALLIED AND TECHNICAL WORKERS OF THE UNITED STATES AND CANADA, their officers, agents, employees, servants, and all persons in active concert or participation with them, are hereby permanently *enjoined* and *restrained* from discriminating against any Black applicant or Black employee of the defendant, Bowman Transportation Company at its Atlanta Terminal or elsewhere for over-the-road drivers in violation of Title VII of the Civil Rights Act of 1964.
>
> The defendants are enjoined from implementing a seniority system which would interfere with the rights under this judgment of black employees in the classes herein defined.
>
> AFFECTED CLASSES.
>
> The affected classes are defined by the court as follows:
>
> CLASS 1. All Black employees at the Atlanta Terminal who were hired prior to August 15, 1968.

> CLASS 2. All Black employees employed at the Atlanta Terminal in the Maintenance Department prior to May 1, 1970.
>
> CLASS 3. All Black applicants who applied for positions as over-the-road drivers prior to January 1, 1972.
>
> CLASS 4. All Black employees who applied to transfer to over-the-road drivers positions prior to January 1, 1972.
>
> ORDERS.
>
> *The members of CLASS 1* have all been restricted to jobs in the Tire Shop prior to August 15, 1968, by the racially discriminatory policies of the defendant company. Hereafter any member of the affected class who competes with a non-member in a bid to transfer or be promoted within the company shall be entitled to compete on the basis of company seniority until such date plus any departmental seniority thereafter, rather than departmental seniority only.
>
> *The members of CLASS 2* have been restricted to jobs in the Tire Shop and prevented from transferring to the Tractor and Trailer Shops within the Maintenance Department by the racially discriminating policies of the defendant company. All such members shall be notified of the right to bid within the department at the next annual bidding. If bids are lodged and the member is deemed qualified, he shall thereafter be credited with departmental seniority from the date of original employment in all future bidding.
>
> *The members of CLASS 3* have been effectively denied employment as over-the-road drivers prior to January 1, 1972. All Black applicants as revealed by the company records prior to such date shall be notified in writing of their right to be considered for employment by the company within 30 days and given 30 days thereafter to indicate their interest. If consideration is requested, then they shall be afforded priority in consideration over all other applicants until each such applicant, in chronological order, has been accepted or rejected by the company. Two applicants,

Harbor and McLoughlin, shall be considered within 15 days by the company. In any such applications, race shall not be used by the company as a means of denying employment to any applicant.

The members of CLASS 4, who sought to transfer from a job as "city driver" or elsewhere to road driver shall likewise be afforded priority in consideration for such employment in chronological order along with the members of CLASS 3.

A copy of this order, or such substituted order as agreed upon by counsel, shall be posted in a conspicuous place in each department and sub-department of the Defendant, Bowman Transportation Company's Atlanta Terminal and in the office of each terminal and warehouse of the Defendant elsewhere for the period of 60 days. In addition, all bids shall hereafter be posted in each sub-department and shop in the Atlanta Terminal.

The court's conclusions of law indicate that Franks represented the first two of the "affected classes" and Lee represented the second two. Analytically, a fifth class is implicit in the first paragraph of the district court's order—the class of all black job applicants and employees of Bowman. The four enumerated categories may be considered subclasses within this larger class. Their apparent purpose is to delineate the groups which the district court concluded were entitled to a special affirmative remedy, beyond the general prohibition against future discrimination. August 15, 1968, the date used to define class 1, is the day the first black dock worker at the Atlanta terminal was hired. The district court evidently found that the discrimination barrier which excluded blacks from employment in the City Driver and Dock Department wholly dissolved on that day. The dates used to define the remaining classes are not tied to concrete events in the record; it appears that the district court believed discrimination in the relevant areas ceased on approximately the days

indicated. Although appellants cast their arguments in terms of remedy, and do not directly assail the definition of the classes, or subclasses, and although we shall in the remainder of this opinion speak in terms of remedies, it is clear that modifications in the remedy afforded could necessitate redrawing to some extent, the classes. Where appropriate, such redrawing should be performed on remand. *See* Johnson v. Georgia Highway Express Co., 5th Cir. 1969, 417 F.2d 1122, 1124.

C. Standard of Review

The power of the district court to fashion an equitable remedy is broad:

> Once a right and a violation have been shown, the scope of the district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.

Swann v. Charlotte-Mecklenburg Board of Education, 1971, 402 U.S. 1, 15, 91 S.Ct. 1267, 1276, 28 L.Ed.2d 554. Generally, the exercise of this equitable discretion will be disturbed on appeal only for an abuse of discretion.

[12] The limits of the district court's discretion are marked by its duty to carry out within practicable limits the purpose of Title VII, which is to make the discriminatee whole and to remedy the effects of past discrimination. Vogler v. McCarty, Inc., 5th Cir. 1971, 451 F.2d 1236, 1237; *cf.* Louisiana v. United States, 1965, 380 U.S. 145, 154, 85 S.Ct. 817, 822, 13 L.Ed.2d 709. To accomplish this end, the district courts are not "limited to simply parroting the Act's prohibitions." Local 53 of International Association of Heat & Frost Insulators & Asbestos Workers v. Vogler, 5th Cir. 1969, 407 F.2d 1047, 1052. Rather they should order "such affirmative action as may be appropriate." § 706(g) of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e–5(g). If an appellate court can determine from the record that the relief granted is not sufficient to

make the discriminatee whole as far as possible, then the district court's order falls outside the bounds of its discretion. For some recurrent problems, we have had occasion in previous cases to discuss the minimum appropriate remedy, and such cases provide more specific limits and guidelines for the exercise of discretion. *See, e. g.*, Local 189, United Papermakers and Paperworkers, AFL–CIO, CLC v. United States, 5th Cir. 1969, 416 F.2d 980, cert. denied 1970, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100 (seniority relief).

D. Asserted Inadequacy of the District Court's Decree

1. Seniority Relief

The district court's order allowed members of class 1 (all present black employees at the Atlanta terminal who were hired before August 15, 1968) to compete for jobs on the basis of company seniority accumulated before August 15, 1968, the date the first black dock worker was hired, and departmental seniority accumulated thereafter. Appellants characterize this aspect of the decree as "halfway seniority relief." They contend (1) that members of class 1 should be allowed to use company seniority accumulated after as well as before August 15, 1968, (2) that members of class 4 (present Bowman employees who applied to transfer to OTR positions before January 1, 1972) who are hired as OTR drivers pursuant to the court's decree should be able to use company seniority for all purposes in the OTR Department, and (3) that members of class 3 (pre-January 1, 1972 black OTR applicants) who are hired pursuant to the court's decree should be awarded constructive OTR departmental seniority beginning on the date they would have been hired but for the discrimination.

[13–16] When a departmental seniority system perpetuates the effect of past discrimination it is an unlawful employment practice proscribed and remediable under Title VII. *E. g.*, United States v. Bethlehem Steel Corporation, 2nd Cir. 1971, 446 F.2d 652; Robinson v. Lorillard Corp., 4th Cir. 1971,

441 F.2d 791, cert. dismissed 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655; Local 189, United Papermakers and Paperworkers, AFL–CIO, CLC v. United States, *supra*; Quarles v. Philip Morris, Inc., E.D.Va.1968, 279 F.Supp. 505. Though not as drastic as a rigid no-transfer rule, a departmental seniority system discourages transfers and thereby locks a discriminatee into his inferior job by threatening him with loss of his accumulated seniority if he should transfer. "In any industry loss of seniority is a critical inhibition to transfer." United States v. Jacksonville Terminal Co., 5th Cir. 1971, 451 F.2d 418, 453, cert. denied 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815. That the system is racially neutral on its face does not save it under Title VII if its effect is to "cut into the employees' present right not to be discriminated against on the ground of race." *Local 189, supra* at 988; *See also* United States v. Jacksonville Terminal Co., *supra* at 451. The federal courts' power to modify or suspend the operation of a discriminatory seniority system is not affected by the fact that the seniority system has been established in a private, collective bargaining agreement. Vogler v. McCarty, Inc., 5th Cir. 1971, 451 F.2d 1236. The only ground upon which a discrimination-perpetuating seniority system may be defended is that of business necessity. "When a policy is demonstrated to have discriminatory effects, it can be justified only by a showing that it is necessary to the safe and efficient operation of the business." Jones v. Lee Way Motor Freight, 10th Cir. 1970, 431 F.2d 245, 249; *see* Robinson v. Lorillard Corp., *supra* at 797; *Local 189, supra*.

In this case it is undisputed that the members of class 1 were originally relegated to inferior jobs in the Tire Shop as a result of Bowman's racially discriminatory hiring practices. Further, it is clear that the departmental seniority system has the forbidden effect of locking discriminatees into the pattern thus created. Neither Bowman nor the union has attempted to defend the seniority system as a "business necessity." As the district court recognized, class 1 members are entitled to

relief from the locking-in effect of the departmental seniority system. The question presented is what form the remedy must take and how far it must go.

The leading case in this Circuit on seniority relief under Title VII is Local 189, United Papermakers and Paperworkers, AFL–CIO, CLC v. United States, 5th Cir. 1969, 416 F.2d 980, cert. denied 1970, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100, aff'g, E.D.La.1969, 301 F.Supp. 906. There, Judge Wisdom endorsed for our Court the "rightful place"[14] approach to seniority problems.

> A "*rightful place*" theory stands between a complete purge of "but-for" effects [and] maintenance of the status quo. The Act should be construed to prohibit the *future awarding* of vacant jobs on the basis of a seniority system that "locks in" prior racial classification. White incumbent workers should not be bumped out of their *present* positions by Negroes with greater plant seniority; plant seniority should be asserted only with respect to new job openings. This solution accords with the purpose and history of the legislation.

Id. at 988. He concluded that the decree entered by the district court in that case accorded with the rightful place interpretation of the Act. That decree "permanently abolished" the offending "job seniority system" and allowed discriminatees to compete for jobs on the basis of "mill seniority," which was to be computed from the beginning of the employee's service at the mill, regardless of the job slot he occupied, up to the date of his bid. United States v. Local 189, United Papermakers and Paperworkers, AFL–CIO, CLC, E.D.La.1969, 301 F.Supp. 906, 919.

In the United States v. Jacksonville Terminal Co., 5th Cir. 1971, 451 F.2d 418, cert. denied 406 U.S. 906, 92 S.Ct. 1607, 31

14. The "rightful place," "freedom now," and "status quo" theories were first distinguished and analyzed in Note, Title VII, Seniority Discrimination, and the Incumbent Negro, 80 Harv.L.Rev. 1260 (1967).

L.Ed.2d 815, we applied the *Local 189* principles and found that the "craft and class" seniority system at issue in that case was a discriminatory unlawful employment practice under Title VII. We held that an appropriate remedial decree should grant to discriminatees "qualified to fill vacancies . . . the right to bid for . . . positions on the basis of Terminal seniority (time worked for the employer) rather than craft or class seniority." *Id.* at 454. In laying down guidelines which the decree should follow, we specified that discriminatees should be allowed to use Terminal seniority "until they successfully bid for, and retain after any on-the-job probationary or training period (if required), positions outside the craft or class which they occupy at the time of the District Court's decree." *Id.* at 458–459.

In United States v. Bethlehem Steel Corp., 2nd Cir. 1971, 446 F.2d 652, the Second Circuit established similar guidelines. Disapproving a discrimination-perpetuating departmental seniority system, it allowed discriminatees to transfer with seniority carryover "only once, and only during the next two years." *Id.* at 666. This once-only, two-year limitation was considered adequate to allow the discriminatee an adequate opportunity to break out of the racial pattern while not giving him a preferential advantage or imposing an unnecessarily unstable situation on the employer:

> Because a transferee will have only one opportunity of limited duration to transfer to a formerly "white" department, the Lackawanna plant will not be thrown into a chaotic game of musical chairs. . . . Nor will any employee have superseniority. . . . .

Id. at 666.

In each of these cases the court has allowed discriminatees to use full company seniority to compete for job openings for at least a reasonable time after the entry of the court's decree. In *Local 189* the discriminatory system was "permanently abolished" and mill seniority substituted for discriminatees, presumably also permanently. In *Jacksonville Terminal*

discriminatees could use company seniority for transfer purposes only once but the use might possibly be delayed for a lengthy period. In *Bethlehem Steel* the court imposed a one-time or two-year limitation on discriminatees' right to transfer with full seniority carryover.[15]

[17] Both the precedents and the nature of the wrong, we think, indicate that the remedy afforded by the district court should allow to employees locked into old racial patterns by the departmental seniority system the use of full company seniority for transfer purposes for a reasonable time and for all purposes after transfer in the new department. The locking-in effect of departmental seniority on present employees does not cease as of the date that discrimination as to new hirees ceases. To allow for purposes of transfer—*i.e.* bidding on a new job in a different department—the use of company seniority accumulated only up to the date on which discrimination in hiring at the terminal ceased in the past would force discriminatees to compete with non-discriminatees on an unequal footing in the present. To permit only partial seniority carryover would only reduce the penalty which a discriminatee would suffer by transferring, but would not eliminate it. The district court's decree should dissolve the barrier to transfers completely by allowing the use of full company seniority. Pettway v. American Cast Iron Pipe Co., 5th Cir. 1974, — F.2d — [No. 73-1163, Apr. 29, 1974]. Further, the discriminatee should be allowed a reasonable time for using company seniority to escape the racial patterns created in the past. The right of the discriminatee to transfer with seniority carryover on the basis of company seniority need not be extended indefinitely into the future, but a

15. Compare Quarles v. Philip Morris, Inc., E.D.Va.1968, 279 F.Supp. 505, where the court required a prompt declaration of interest by discriminatees and prompt screening to identify those who would be able to bid on the basis of company seniority, but designated no cut-off date in the future after which those discriminatees would no longer be able to use company seniority.

reasonable time after the entry of the decree must be allowed.[16]

This same reasoning applies to members of class 4 (black employees who applied to transfer to OTR positions prior to January 1, 1972) as well as other pre-January 1, 1972 black employees who were excluded from OTR jobs at the time of their original employment. Those who are found qualified for OTR jobs should be allowed to bid for them on the basis of company seniority and should not be penalized for accepting them by loss of all or a portion of their accumulated company seniority. They should be allowed to carry over accumulated company seniority for all purposes in the OTR department.[17] United States v. Bethlehem Steel Corp., *supra*.

In treating questions of seniority here, we do not, of course, suggest that Bowman must hire without regard to qualification. "Secretaries must be able to type. There is no way around that necessity." *Local 189, supra* at 989. And truck drivers must be qualified to drive. But transfer applicants must be accepted or rejected, as the district court's decree requires, on the basis of valid, non-racial criteria.

[18] In seeking application-date seniority for members of class 3 (black applicants who applied for OTR jobs before January 1, 1972) appellants ask us to take a giant step beyond permitting job competition on the basis of company seniority.

16. We believe a one-transfer-only limitation would be reasonable also, either in conjunction with or in addition to the time limitation, since the discriminatee stands on a substantially equal footing with his white contemporaries once he has escaped the confines of the racial pattern in which he has been trapped.

17. In Bing v. Roadway Express, Inc., 5th Cir. 1973, 485 F.2d 441, we dated seniority for transferring road drivers from the date of qualification. In that case, Roadway had a flat requirement of one year's experience for road drivers, so that the qualification date was easily calculable. To allow the use of company seniority before that date would have placed the discriminatee in a better position than he could have achieved without the discrimination. In this case, by contrast, Bowman had no rigid one-year experience requirement. It sometimes accepted OTR trainees with little or no prior driving experience.

They ask us to create constructive seniority for applicants who have never worked for the company. Granting that the black OTR applicants who were rejected on racial grounds suffered a wrong, we do not believe that Title VII permits the extension of constructive seniority to them as a remedy. Section 703(h) of Title VII, 42 U.S.C.A. § 2000e–2(h), provides:

> Notwithstanding any other provision of this title it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.

The discrimination which has taken place in a refusal to hire does not affect the bona fides of the seniority system. Thus, the differences in the benefits and conditions of employment which a seniority system accords to older and newer employees is protected as "not an unlawful employment practice." Facing this problem in *Local 189*, Judge Wisdom wrote:

> It is one thing for legislation to require the creation of *fictional* seniority for newly hired Negroes, and quite another thing for it to require that time *actually worked* in Negro jobs be given equal status with time worked in white jobs. . . . [C]reating fictional employment time for newly-hired Negroes would constitute preferential rather than remedial treatment.
>
> . . . . . .
>
> No stigma of preference attaches to recognition of time actually worked in Negro jobs as the equal of white time. . . . We conclude . . . that Congress exempted from the anti-discrimination requirement only those seniority rights which gave white workers preference over junior Negroes.

Local 189, supra at 995. We are guided by his reasoning here. The district court did not abuse its discretion in refusing to create constructive seniority for black OTR applicants who were rejected as a result of Bowman's discriminatory policy.

In conclusion, we agree with appellants' contention that present Bowman employees who have been discriminated against in the past and remain locked-in to the racial pattern by departmental seniority must be allowed to compete for jobs in other departments on the basis of full accumulated company seniority, and that this remedy should be made available for a reasonable time to permit them to take advantage of it. On remand the decree should be modified in accordance with these views. We do not agree that constructive seniority may be created and awarded to those who are not employees.

2. Affirmative Hiring Relief

[19] Appellants next contend that the District Court's decree was deficient in failing to provide (1) that Bowman must conduct an active recruitment campaign designed to attract black OTR applicants and must hire one black OTR driver for every new white OTR driver hired until twenty percent of the OTR drivers are black, and (2) that Bowman must actively recruit black office and clerical workers in a manner specifically designed to inform the black community of clerical job opportunities. Appellants included both of these measures in a proposed decree which they submitted to the District Court.

The record in this case shows that Bowman followed a conscious policy of excluding blacks from its OTR Department until September 1970, a time over five years after the effective date of the Civil Rights Act of 1964. The District Court found that Bowman, although aware of its legal obligations, intentionally continued to follow its discriminatory policy and put off hiring black OTR drivers as long as it could. It began hiring black OTR drivers in 1970 only under pressure from the OFCC and at least one EEOC complaint. As we have often

observed, actions taken under such pressure and in the face of threatened or pending litigation are at best "equivocal in purpose, motive and permanence." Jenkins v. United Gas Corp., 5th Cir. 1968, 400 F.2d 28, 33; *see also* Rowe v. General Motors Corp., 5th Cir. 1972, 457 F.2d 348, even when they are drastic and go far toward remedying the effects of past discrimination. In this case, the sincerity and permanence of Bowman's conversion to nonracial employment practices are all the more dubious in light of the steadily declining rate at which Bowman has hired black OTR drivers after September of 1970 and in light of the small percentage (3.3%) of the OTR Department which was black at the time of trial.[18] Public recruitment has been granted previously as a remedy in racial-discrimination cases,[19] and we agree with appellants that this case calls for such a remedy.

At the time the District Court entered its findings of fact, conclusions of law, and order and decree in March, 1972, it did not have the advantage of our *en banc* decision in Morrow v. Crisler, 5th Cir. 1974, 491 F.2d 1053. *Morrow* considered the precise charge made here: that the District Court failed to order sufficient affirmative relief. The *en banc* court there remanded for additional consideration where the events since the District Court decree indicated the initial relief to have been insufficient.

We would vacate so much of the District Court's decree as denies the request for additional affirmative relief and remand to the District Court to update the record in this case, which is now over two years old, and to consider what, if any, additional affirmative relief may be necessary in light of current facts and our decision in *Morrow*.

18. *See* note 10, *supra*, & accompanying text.

19. Public recruitment aimed at blacks was held mandatory in United States v. Georgia Power Co., 5th Cir. 1973, 474 F.2d 906, 926 and in United States v. Sheet Metal Workers International Association, Local 36, AFL–CIO, 8th Cir. 1969, 416 F.2d 123, 139–140. It was also a part of the remedy granted in the following cases: United States v. Ironworkers Local 86, W.D.Wash.1970, 315 F.Supp. 1202, aff'd 9th Cir. 1971, 443 F.2d 544, cert. denied 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367; United States v. Central Motor Lines, Inc., W.D.N.C.1971, 338 F.Supp. 532; United States v. United Association of Journeymen, etc., Local No. 73, S.D.Indiana 1969, 314 F.Supp. 160. The power of the court under Title VII to order, as a remedial measure, advertising and recruitment efforts aimed at minority groups cannot be seriously questioned.

The hurdle which appellants must clear in order to be in a position to demand public recruitment of black office workers is the District Court's finding that Bowman does not discriminate in hiring office workers. We conclude that appellants have cleared this hurdle on the strength of their proof below that Bowman had never hired a black office worker, relied on word-of-mouth advertising to fill vacancies which became available, and followed patently discriminatory practices in connection with the employment of drivers by the Company.

The underlying findings upon which the District Court relied in making its no-discrimination finding were: (1) only three or four of the approximately twenty-five clerical applicants each year are black, (2) blacks have shown little interest in office jobs, and (3) black applicants are treated no differently than white applicants. Further pertinent facts appearing in the record, which are not disputed, are (4) that Bowman had never hired a single black office or clerical worker in Atlanta by the time of trial, and (5) Bowman did not publicize office job vacancies but relied on word-of-mouth advertising by the current all-white office staff.

The most vociferous figure regarding the office and clerical workers in this case is that Bowman's office staff was at the time of trial and had always been one hundred percent white. This statistic alone raises a question concerning racial discrimination in Bowman's hiring of office workers. See United States v. United Brotherhood of Carpenters and Joiners of America, Local 169, 7th Cir. 1972, 457 F.2d 210, 214; United States v. Hayes International Corp., 5th Cir. 1972, 456 F.2d 112, 120. It has not been shown to be the result of any business necessity, or extenuating circumstances, or any cause other than a preference for whites in hiring.

The suggestion that the all-white composition of the office staff is due to lack of interest on the part of blacks or the small number of black applicants is singularly unpersuasive in view of Bowman's heavy reliance on word-of-mouth recruiting. We recognized recently in United States v. Georgia Power Co., 5th Cir. 1973, 474 F.2d 906, 925, that when all current employees in a unit are white "word-of-mouth hiring alone would tend to isolate blacks from the 'web of information' which flows around opportunities at the company." Although this recruiting method is racially neutral in form, in practice it operates as a "builtin headwind" to blacks. *Id.*; Parham v. Southwestern Bell Telephone Co., 8th Cir. 1970, 433 F.2d 421; Clark v. American Marine Corp., E.D.La.1969, 304 F.Supp. 603, 606, 608. No business necessity for Bowman's exclusive reliance on this recruiting method has been shown or argued.

Inasmuch as the record is clear as to the discriminatory employment practices concerning drivers, we think that the above evidence was sufficient to carry the plaintiff's burden of proof that discrimination in hiring office workers was sufficiently shown to justify some relief.

Under the circumstances of this case we agree with appellants that the District Court's failure to order some hiring relief in the form of public recruitment to attract black office and clerical workers, as well as to attract OTR applicants, was an abuse of discretion, and that advertising of office job vacancies through some medium designed to reach blacks would be appropriate.

We do not specify the precise form which such recruiting is to take. "[A]dvertisements of openings in newspapers and periodicals accessible to the black communities of Atlanta and other Georgia cities, and public notice that the company is an equal opportunity employer, are common recruiting techniques which should be considered. . . . We hold only that the present word-of-mouth practice must be supplemented or changed." United States v. Georgia Power Co., *supra*, at 926.

In summary, we conclude that this case warrants affirmative hiring relief for potential black OTR drivers in the form of public recruitment, consideration of additional affirmative relief in the light of our opinion in *Morrow*, and affirmative hiring relief for potential black office workers in the form of public recruitment. We leave to the District Court the task and prerogative of devising the particular form these remedies should take and of framing an appropriate decree.

3. Mandatory Training for Discriminatees

[20] Appellants next ask that Bowman be ordered to establish special training programs to upgrade the skills of discriminatees and to facilitate their movement out of inferior jobs.

Bowman's record of denying training opportunities to blacks is bad. From 1968 to 1971 Bowman hired 75 to 150 white OTR drivers with no prior truck driving experience and trained them by assigning them to "ride double" with experienced drivers. At the same time, assertedly because of the racial prejudice of all its white drivers, similar training opportunities were denied blacks. Prior to August of 1968 blacks were absolutely excluded from city driver jobs, which may lead to qualification for OTR jobs. In the Maintenance Department, black Tire Shop employees have been denied access to jobs through which they might progress to mechanic position.

At a minimum, an effective remedy in this case must allow black applicants and new employees access to training opportunities on an equal basis with whites in the future. This requirement is implicit in the first paragraph of the district court's decree. It is little more than an echo of Title VII's general prohibition against discrimination in hiring and promoting. Further, if black Bowman employees who are presently locked into racial patterns due to past discrimination are

to have a meaningful opportunity to advance, we think they must be afforded special temporary remedial training opportunities. A Tire Shop employee's seniority will be of little use to him in bidding on a mechanic's slot so long as he lacks the necessary skills. As the district court observed, "as a practical matter, nobody in the tire shop can bump a mechanic."

Heretofore Bowman has trained its employees on the job. Inexperienced OTR drivers ride double with experienced drivers. Certain jobs in the Maintenance Department are training steps to the mechanic jobs, and city driver jobs lead to qualification for OTR jobs. On remand the district court should identify those positions which are training grounds, and impose conditions to ensure that a substantial number of Bowman's employees who have been discriminatorily relegated to inferior jobs in the past are afforded a ready access to them. Pettway v. American Cast Iron Pipe Company, supra.

In analogous employment discrimination cases, some courts have ordered the creation, at company expense, of counselling and training programs to which discriminatees must be admitted in certain numbers each year or according to a fixed ratio until they hold a certain percentage of the skilled positions. *See* Buckner v. Goodyear Tire & Rubber Co., N.D.Ala.1972, 339 F.Supp. 1108, 1124–1125; United States v. Ironworkers Local 86, W.D.Wash.1970, 315 F.Supp. 1202, 1247–1250, aff'd 9th Cir. 1971, 443 F.2d 544, cert. denied 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367. From our appellate prospective, we cannot say that the creation of special new training programs is necessary in this case to afford discriminatees an opportunity to overcome the effects of past discrimination. The inadequacy of existing training methods to accomplish this purpose is not demonstrated in the record. If the district court should find, however, that further remedial measures are necessary to afford adequate training opportunities, it may fashion and grant them.

4. Retention of Jurisdiction

[21] Bowman maintained blatantly discriminatory policies at least until September of 1971, over five years after the passage of Title VII. Since that time it has moved some distance toward complying with Title VII's mandates, but only under pressure from government agencies and in the face of threatened litigation. These circumstances, as well as the decreasing rate at which it has hired black OTR drivers, necessarily cast some doubt on its intention to discontinue and remedy its unlawful employment practices voluntarily. The district court should retain jurisdiction of this case for at least two years and require periodic reports from Bowman which will enable it to ascertain that the remedial measures it mandates are being carried into effect.

E. Back Pay

[22] The district court denied back pay to the affected classes on the basis of its conclusions that such relief (1) would be inconsistent with the purpose of Title VII to promote conciliation rather than litigation where possible, and (2) would not be "warranted" in a Rule 23(b)(2) class action, which contemplates primarily injunctive and declaratory relief. In addition, the court stated back pay to non-named class members was denied in the exercise of discretion. We do not agree that either Rule 23(b)(2) or Title VII prohibits back pay awards to non-named class members. Further, since it appears that the district court exercised its discretion under an erroneous view of the applicable law, we vacate its decree insofar as it denies back pay to the class and remand for reconsideration of this issue. *Cf.* United States v. Georgia Power Co., 5th Cir. 1973, 474 F.2d 906, 921; Johnson v. Goodyear Tire & Rubber Co., 5th Cir. 1974, 491 F.2d 1364; Pettway v. American Cast Iron Pipe Co., supra.

The remedies authorized in Title VII specifically include back pay. As indicated above, the purpose of Title VII is to make the discriminatee whole and eliminate the effects of past discrimination as far as possible. Where the discriminatee has suffered economic injury in the form of lost wages, back pay is normally appropriate relief. Harkless v. Sweeny Independent School District, 5th Cir. 1970, 427 F.2d 319, 324. The district court recognized this in awarding back pay to Lee. One apparent source of its reluctance to extend this remedy to class members was its view that to do so would allow class members to circumvent EEOC conciliatory efforts and thus frustrate Title VII's policy favoring resolution of problems through conciliation rather than litigation where possible. This view conflicts with what we said in Oatis v. Crown Zellerbach Corp., 5th Cir. 1968, 398 F.2d 496, 499:

> Racial discrimination is by definition class discrimination, and to require a multiplicity of separate, identical charges before the EEOC, filed against the same employer, as a prerequisite to relief through resort to the court would tend to frustrate our system of justice and order.

See also Miller v. International Paper Co., 5th Cir. 1969, 408 F.2d 283, 284–285. An EEOC complaint filed by the class representative allows an adequate opportunity for resolution of problems of the class through conciliation, Bowe v. Colgate-Palmolive Co., 7th Cir. 1969, 416 F.2d 711, 720, and opens the courthouse doors for the class. While *Oatis* and *Miller* did not focus particularly on the back pay relief sought, we see no basis for treating a back pay claim as unique and requiring each class member to file his claim with the EEOC before asserting it in the courtroom. The Seventh Circuit has reached the same conclusion on this issue:

> The clear purpose of Title VII is to bring an end to the proscribed discriminatory practices, and to make whole, in a pecuniary fashion, those who have suffered by it. To

> permit only injunctive relief in the class action would frustrate the implementation of a strong Congressional purpose expressed in the Civil Rights Act of 1964. To require that each employee file a charge with the EEOC and then join in the suit would have a deleterious effect on the purpose of the Act and impose an unnecessary hurdle to recovery for the wrong inflicted.

Bowe v. Colgate-Palmolive Co., 7th Cir. 1969, 416 F.2d 711, 720. We believe this view is correct, and we hold that neither the letter nor the spirit of Title VII precludes back pay awards to non-named class members when only the class representative has filed an appropriate EEOC complaint.

Nor does Fed.R.Civ.P. 23(b)(2) prohibit back pay awards to non-named class members in a class action under that subdivision of the rule. Pettway v. American Cast Iron Pipe Co., supra; Robinson v. Lorillard Corp., 4th Cir. 1971, 444 F.2d 791, 802, cert. dismissed 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655. It is true that Rule 23(b)(2) refers only to "injunctive relief or corresponding declaratory relief" and "does not extend to cases in which the appropriate final relief relates *exclusively* or *predominantly* to money damages." Advisory Committee's Notes, 1966, 39 F.R.D. 69, 102 (emphasis added). But this Title VII action cannot be characterized as one seeking "exclusively or predominantly money damages." As we have pointed out above, back pay awards under Title VII (and under § 1981 to the extent that a § 1981 corresponds to a Title VII action) are not damages, as such, but an integral part of the equitable remedy. Even if back pay is considered as equivalent to damages under Rule 23, in this case back pay is not the exclusive or predominant remedy sought.

The district court should devise an appropriate procedure for adjudicating the claims of non-named class members for back pay awards. Johnson v. Goodyear Tire & Rubber Co., supra. Reliance on a master may be appropriate. Pettway v.

American Cast Iron Pipe Co., supra; *cf.* Robinson v. Lorillard Corp., M.D.N.C.1970, 319 F.Supp. 835, 843, aff'd 4 Cir., 444 F.2d 791, cert. dismissed 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655. Insofar as the district court's judgment denies back pay to non-named class members it is reversed, and this issue is remanded for reconsideration in light of the principles enunciated above.

IV. Summary

In summary, we hold:

(1) Franks' individual claim was not barred by limitations, and, subject to the district court's determination as to the applicability of laches, the district court should on remand enter judgment in his favor and grant him an appropriate remedy;

(2) the district court's determination of the facts relating to Lee's individual claim was not clearly erroneous;

(3) the class and subclasses represented are entitled to further affirmative relief than was afforded by the district court's decree, including the use of full company seniority for black Bowman employees who currently remain locked into old racial patterns, public recruitment aimed at potential black OTR drivers and clerical employees, temporary measures to ensure access to training opportunities for discriminatees, and such *Morrow* type affirmative hiring relief as the district court deems appropriate. The district court should retain jurisdiction of this case and require compliance reports from Bowman for at least two years. The district court's denial of back pay to non-named class members is reversed and the issue is remanded for reconsideration in light of this opinion and Johnson v. Goodyear Tire & Rubber Co., supra.

Costs on appeal will be taxed one-tenth against Lee, three-tenths against the union, and six-tenths against Bowman. Appellants' attorneys are entitled to an award for fees earned in the prosecution of this appeal under 42 U.S.C.A. § 2000e–5(k). On remand the district court should determine an appropriate fee award.

The district court's judgment is affirmed in part, reversed in part, vacated in part, and remanded.

Judgment of the United States Court of Appeals for the Fifth Circuit

FRANKS v. BOWMAN TRANSP. CO.

Appeal from the United States District Court for the Northern District of Georgia

Before THORNBERRY, AINSWORTH and RONEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part, reversed in part, and vacated in part; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

It is further ordered that intervenor-appellant Lee be condemned to pay one-tenth of the costs on appeal to be taxed by the Clerk of this Court; and that defendant-appellee the union be condemned to pay three-tenths of said costs; and that defendant-appellee Bowman Transportation Company be condemned to pay six-tenths of said costs.

Issued as Mandate: June 3, 1974

Order of United States Court of Appeals for the Fifth Circuit Denying Petition for Rehearing

FRANKS v. BOWMAN TRANSP. CO.

Appeal from the United States District Court for the Northern District of Georgia

ON PETITION FOR REHEARING

(Filed July 15, 1974)

Before THORNBERRY, AINSWORTH and RONEY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed by defendant-appellee Bowman Transportation, Inc. in the above entitled and numbered cause be and the same is hereby denied.

Order of United States Court of Appeals for the Fifth Circuit Denying Petition for Rehearing

FRANKS v. BOWMAN TRANSP. CO.

September 12, 1974

TO ALL COUNSEL OF RECORD

Re: 72-3239—Franks, et al., vs. Bowman Transportation Co., et al.,

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

Edward W. Wadsworth
Clerk
By /s/ Arvin G. Parens
Deputy Clerk

Opinion of the United States District Court Northern District of Georgia Atlanta Division

FRANKS v. BOWMAN TRANSP. CO.

(Filed June 29, 1972)

This is a suit brought under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e ff), alleging racial discrimination in various employment practices of the defendant company at its Atlanta Terminal and through its collective bargaining agreement with the defendant union. The petition was originally brought by the plaintiff Franks, after processing of his complaint by the EEOC, both on his individual claim and as a class action. Subsequently, the court permitted the intervention of Johnnie Lee on his individual claim, also processed by the EEOC, and on behalf of another class of employees not represented by Franks. As finally constituted, the case presents

the class questions of racial discrimination in the hiring, transfer, promotion and discharge practices[1] in the following departments:

(a) Over-the-road drivers

(b) Dock and City drivers

(c) Maintenance

(d) Office and clerical.

In the individual claims, Franks seeks redress for his discharge from the Maintenance Department on or about May 10, 1968. Lee seeks redress for an original failure to hire, for failure to transfer, and for discharge as an over-the-road driver on or about March 19, 1971. On the evidence presented the court makes the following

FINDINGS OF FACT

The Class Action.

The defendant, Bowman Transportation, Inc., (the Company) is a licensed common carrier operating along the eastern seaboard and in certain areas of the midwest under ICC and state regulations. It operates major terminals at Atlanta, Richmond, Charlotte and Birmingham. Its principal office and garage has been located at Gadsden, Alabama, but is in process of being transferred to Atlanta. Each major terminal operates as a hiring center not only for terminal employees but for over-the-road drivers who, of course, operate system wide. After a bitter struggle, the company was unionized by the other defendants and col-

1. Originally, the petition attacked the use of a high school education requirement and certain testing as employment requisites in the office. However, this issue has been mooted by the company's abolition of such requirements over a year prior to trial.

lective bargaining agreements were sucessfully negotiated in 1967 and 1970.

By their terms, the job classifications at the Atlanta terminal are divided into three departments: (a) Over-the-road drivers; (b) City Drivers and Dock Workers; and (c) Maintenance Department, which embraces the Tractor Shop (including engine repair), the Trailer Shop (including body repair), and the Tire Shop. Road drivers throughout the system constitute a single department. Office, sales and clerical jobs are non-union, but in essence constitute another department at each terminal. Thus, this suit in its class aspects involves all road drivers system-wide and all other employees at the Atlanta terminal (Dock, Maintenance, and Office Departments).

Prior to 1968, the company was almost totally segregated by race. Each department and sub-division did its own hiring and adhered to strict racial lines. Moreover, transfers from one to the other were discouraged and virtually prohibited by management. Only an approved "hardship case" warranted a transfer of any kind and this was a rare occurrence. Prior to 1968, no Black person had ever been employed in any job outside the Maintenance Department. With the exception of two "clean up men" in the Trailer Shop, all Black employees were assigned to the Tire Shop which was predominantly Black with white supervision. The percentage of Black employees at the Atlanta terminal remained at 1% or less until that time. By August, 1971, it has risen to only 4.5%.

The following represents an accurate distribution of jobs by race as of the dates indicated:

Dept./Job	July, 1965 Blacks	July, 1965 Whites	March, 1968 Blacks	March, 1968 Whites	August, 1971 Blacks	August, 1971 Whites
Office & Managerial	0	23	0	27	0	42
Sales Personnel	0	6	0	5	0	5
Office/Clerical	0	27	0	63	0	53
Ship Parts Clerk	0	8	0	9	0	9
Over-the-Road Drivers						
Atlanta Terminal	0	360	0	361	0	230
All Other	0	55	0	103	11	269
TOTAL	0	415	0	464	11	499
City Driver/ Dock Jobs						
City Drivers	0	79	0	80	3	81
Checkers	0	23	0	127	4	103
Dock Workers	0	84	0	94	6	60
TOTAL	0	186	0	301	13	244
Shop Workers						
Mechanics	0	70	0	92	0	63
Trailer Shop	-	-	-	-	0	36
Grease/Oil Men	0	6	0	8	0	4
Tire Shop	7	1	9	3	16	2
Clean-up Men	-	-	1	1	4	0
Janitors	0	1	0	2	1	1
TOTAL	7	78	10	106	21	106
TOTAL EMPLOYEES	7	743	10	1025	45	958

By wage, Blacks were consistently frozen into the lower paying jobs. The following represents an accurate distribution of wage classifications by race as of the dates indicated.

March, 1968

Weekly Wage:	Number of Blacks	Number of Whites	Percent Blacks
More than $150 (Road Drivers)	0	464	0.0%
$125-150 (Terminal Employees)	0	393	0.0%
Less that $125 (Terminal)	10	12	45.5%
TOTAL	10	869	1.1%

August, 1971

Weekly Wage:	Number of Blacks	Number of Whites	Percent Blacks
More than $225 (Road Drivers)	11	499	2.2%
$125-210 (Terminal Employees)	13	343	2.7%
$175 (Terminal)	20	6	76.9%
TOTAL	44	848	4.9%

In its hiring policies, the company relied largely on referrals from other employees or "walk-in." The former ordinarily applied in the department to which he was referred and this perpetuated the racial make-up of the respective departments. With the exception of an insignificant number of Black applicants specifically applying for office jobs (four), the walk-ins were ordinarily referred to departments by race. Blacks were specifically directed to the Tire Shop.

Partly because of existing ICC/ODT requirements the company exercised greater selectivity in the employment of over-the-road drivers. Qualifications of age, health, experience and mechanical ability were required. For awhile written ODT tests were required. In addition, the company sought to impose stricter standards for references and clean traffic records. Following personal interview and approval, the new employees, if experienced, "ride double" for a required period and if inexperienced obtain on-the-job training in the same fashion. These policies re-

quired the sharing of cabs and bunk-rooms and showers on the road. As a result there was considerable driver resentment against the hiring of Black road drivers. Prior to 1970, management discussed the situation many times and, fearful of driver reaction, adopted an unwritten policy against hiring Blacks for such jobs. Only a handful applied and they were not really considered. Similarly, any efforts of a city-driver to transfer to the road were effectively discouraged. By different methods, the hiring of Black road drivers was "put off as long as could" by the company. With the exception of a few lease-truck operators, no Blacks ever served as road drivers until 1970.

In 1970, the company began receiving substantial numbers of Black applicants for the position of road driver. In response to mounting pressure and partly due to the filing of an EEOC complaint by the intervenor Lee in Birmingham, the company finally relaxed its policy. Black road drivers were hired at the several terminals for the first time on the following dates: Birmingham, September 11, 1970; Richmond, September 12, 1971; Atlanta, November 21, 1971; Charlotte, February 15, 1972. Prior to such dates, the company had available Black applicants who, if otherwise qualified, had experience with the same equipment as city drivers or with other transportation companies. At least two Blacks, Harbor and McLaughlin applied in late 1970 or early 1971 and were told there were no openings when in fact there were. On the facts, each appears experienced and not obviously disqualified and were entitled to consideration for employment at the time.

The company presently employs no racial discrimination in hiring road drivers and some 10% of such drivers are now Black. The policy has worked out satisfactorily and "a whole lot better" than management thought.

Meanwhile within the terminal, the 1967 collective-bargaining agreement effectively removed the "no transfer" policy formerly in existence and concurrently opened the way for Black hirings in all departments. As a result Blacks were first hired into former all-white jobs in the Dock department as checker on August 15, 1968; as dock worker on October 21, 1968; and as city driver on June 20, 1969. While the contract provided for interdepartmental transfer for the first time, it recognized a departmental seniority system. This effectively penalized any Senior Blacks wishing to transfer to a previously all-white department in favor of junior whites already employed therein.

While the open transfer provision has worked well in the Dock department since that time, it has not proven out in the maintenance department. The contract provides departmental bidding only and for an annual bidding in August and, in fact, all open jobs are posted. The processing of actual bids is in accordance with the contract and without racial discrimination. However, the efforts of Blacks to transfer out of the Tire Shop into the Tractor or Trailer shops have been significantly discouraged by management. The latter two shops, of course, require considerable mechanical skill and experience. As a result, most hirees are off the street or from outside garages. However, it is possible to begin as a "grease man" and no prior experience is necessary. From that job it is possible to progress to a C mechanic's job (essentially a helper) to B mechanic and finally to A mechanic. The "grease man" job is somewhat distasteful and for that reason many employees, including the vast number of Blacks in the Tire Shop, simply do not want it, even at the loss of an opportunity to progress out of a virtual "dead-end" job in the Tire Shop to the learning of a skilled trade. Some, however, do wish this opportunity. Upon inquiry they have been ad-

vised that it is necessary to resign for a period of six weeks and reapply, or that a straight resignation and reapplication is necessary, or told that he could not transfer. As a result, some Blacks failed to bid for openings in the Tractor and Trailer Shops in which they were genuinely interested. This practice on the part of the company has effectively maintained an all-white Tractor and Trailer Shop. There is no evidence of a failure to hire qualified Black mechanics who originally applied for employment in the Tractor or Trailer shops.

The office employment situation stays rather stable and although there is a substantial number of applicants each year, the hiring rate is very low. In the past five years, there have only been a total of only three or four Black applicants out of an average of 25 each year. Each of these applicants has been treated no differently from any other applicant and race has not been a factor in the employment policies in the office. At time of trial, one Black applicant has been deemed qualified and is waiting for an opening. There simply has been little interest by Blacks in clerical positions at this company and no evidence is produced of racial discrimination in this department.

The company now has an official policy against discrimination in all of its hiring practices.

CONCLUSIONS OF LAW

The court has jurisdiction of this action pursuant to Section 706(f) of the 1964 Civil Rights Act, 42 U.S.C. §2000e-5(f). The defendant, Bowman Transportation Company, is an employer engaged in industry affecting commerce within the meaning of Section 701(b) of the Act, 42 U.S.C. §2000e(b). The defendant Unions are labor or-

ganizations engaged in industry affecting commerce within the meaning of Section 701(d)(e) of the Act, 42 U.S.C. §2000e(d)(e).

The evidence shows a pattern of racial discrimination in the hiring, assignment, transfer, and discharge policies of the company and such practices as perpetrated by the Bargaining Agreement with the unions constitute unlawful employment practices under the Act. 42 U.S.C. §2000e-2(a). E.g. *Bing* v. *Roadway Express, Inc.*, 444 F.2d 687 (5th 1971); *United States* v. *Hayes International Corp.*, 514 F.2d 1038 (5th Cir. 1969).

The action is maintainable as a class action under Rule 23(b)(2). E.g. *Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969). The plaintiff Franks represents all Black applicants/employees hired at the Atlanta Terminal and who sought employment/transfer to the Dock Department prior to August 15, 1968, or transfer within the Maintenance Department prior to May 1, 1972. The intervenor Lee represents all Black applicants who sought to be hired or to transfer to over-the-road driver positions prior to January 1, 1972.

Appropriate injunctive relief for such past discrimination, as provided in the attached decree is ordered. This will include credit for departmental seniority prior to the dates each such practice terminated plus preferential reapplication rights for identified applicants for certain positions.

The plaintiffs also pray for lump sum awards for back pay to any member of an affected class plus retroactive seniority to any rejected applicant. This court was faced with such claims in *United States* v. *Georgia Power Company*, ... F. Supp. ..... (N.D. Ga. 1971), 3 EPD ¶8318 and discussed the problem at length. Suffice it to say here, the

court concludes that such relief is not warranted in class actions. The claims for back-pay presuppose an opening, qualification and performance for every member of the class. The claims for retroactive seniority also presuppose a vacancy, qualification, and perfomance by every member. There is no evidence on which to base these multiple conclusions. More importantly, they bypass the statutory administrative prerequisites to personal suit established by the Congress and any appropriate statute of limitations. In essence, they seek to give individual compensation to the class in gross under circumstances where an individual could not qualify alone. The emphasis on private settlement in the Act is also thwarted by this device. See *Oatis* v. *Crown Zellerbach*, 398 F.2d 496 (5th Cir. 1968); *Jenkins* v. *United Gas Corp.*, 400 F.2d 28 (5th Cir. 1969). For these reasons as well as in the exercise of discretion, these remedies are rejected. Of course, where appropriate they will be afforded the individual claimants here under 42 U.S.C. §2000e-5(g).

Plaintiffs' attorneys are entitled to an award of fees for successful prosecution of this action. The court finds that plaintiffs' attorneys have reasonably spent approximately 200 hours in preparation and trial of this case. Considering the nature of the case, the results obtained, and the experience of the attorneys involved, the court finds in its discretion, such services to be reasonably worth the sum of $7,500.00. Such fees are assessed $6,000.00 on defendant Bowman and $1,500.00 on the remaining defendants. All statutory court costs are assessed on defendant Bowman upon presentation and approval of a proper cost bill.

THE INDIVIDUAL CLAIMS

The Franks Claim.

Plaintiff Harold Franks was hired as a Tire Man in Bowman's Atlanta Terminal Tire Shop on September 13, 1960. With the exception of one year beginning in 1961, during which plaintiff worked as a Grease Man, plaintiff was employed in the Tire Shop as a Tire Man. During 1965, plaintiff resigned due to injury and was rehired on May 16, 1966. In accord with Bowman's policy of assigning Blacks to the Tire Shop, plaintiff was again hired as a tire man earning $2.15 per hour.

Shortly after his return in 1966 he made several inquires about transfers to the Tractor and Trailer Shop and the Dock Department. In accordance with the then company policy, he was advised that transfers were not permitted. After the 1967 contract became effective he again inquired about transfers and was again told he could not.

Plaintiff Harold Franks filed his first charge of racial discrimination against Bowman with the EEOC on March 25, 1968, alleging that Bowman's no transfer rule was part of the company policy of restricting employment for Blacks to the Tire Shop.

Thereafter, EEOC officials investigated Franks' charge, visiting Bowman's Atlanta Terminal and talking with company officials on April 23, 1968, and May 10, 1968. The second visit occurred during the morning hours; Franks was discharged during the afternoon of the same day by his supervisor, Charlie Andrews, for "unauthorized bobtailing", or the use of company vehicles for personal use.

Tire Shop employees are required, as part of the job, to drive tractors to and from the tractor parking areas for service. It is a commonly accepted practice for employees

to do brief personal errands while driving the tractors on these occasions. Wth the exception of plaintiff Harold Franks, no Bowman employee has ever been discharged for "bobtailing" (driving tractor without trailer) on company property. All other discharges for unauthorized bobtailing occurred off of company property. This discharge was for reasons of race.

At the time, Franks was being paid at the rate of $2.60 per hour. However, it is not unreasonable to assume that by the end of 1967 he could legally have transferred to the position of Dock Worker, the entry level job in that department, the company having hired in excess of 50 during that year. A normal work week by the Union contracts is 45 hours and the pay in such job was $3.03 per hour.[2] Thus Franks would ordinarily be entitled to recover the difference in a wage calculated as a dock-worker and his interim earnings.[3]

However, the defendant has moved to dismiss the individual claim for failure to file suit within the 30-day period following issuance of the suit letter. This motion arises out of a confusing set of circumstances. Franks filed two separate EEOC charges: the first on March 25, 1968, alleging, among other things, failure to promote, i.e. trans-

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2.

1967	— $3.03	1970	— $3.94
1968	— $3.23	1971	— $4.34
1969	— $3.43	1972	— $4.74

3. Which are

1968	Harper Motor Lines, Inc.	$ 3,641.16
1969	Harper Motor Lines, Inc.	6,344.79
	Georgia-Alabama-Florida Transportation Co.	1,348.97
1970	Harper Motor Lines, Inc.	3,592.75
	Georgia-Alabama-Florida Transportation Co.	5,576.45
1971	Georgia-Alabama-Florida Transportation Co.	9,587.96
		$30,092.08

fer; the second on May 13, 1968, alleging a discriminatory discharge. By the end of 1969 these charges had been fully acted upon by the EEOC. Meanwhile, on March 21, 1969, Franks' then attorney requested the issuance of a suit letter on both charges. On the same day the suit letter[4] was mailed out to Franks. At the time, he resided at 5339 Victory Drive, Morrow, Georgia, but used 5319 Victory Drive, Morrow, Georgia, where his grandmother, sister and nephew, Calvin High, age 9, resided as his "mailing address" and all his mail was customarily delivered at the latter address. The suit letter was duly delivered there on March 22, 1969, and receipted by the nephew. Franks personally never saw the letter, but learned that High had signed for some letter at the time.

No suit was filed within 30 days after the March 21, 1969, suit letter and Franks' then attorney did nothing. Approximately 1-1/2-2 years later, Franks consulted his present attorneys. In the spring on or about March 2, 1971, apparently at their direction, he filed an "amended charge" reiterating the same charges (D 84-85), but referring to the two previous charges and citing May 10, 1968, as "the most recent date" on which discrimination occurred. A new suit letter issued on April 14, 1971, and this action was timely filed thereafter.

On these facts, the court concludes that the class aspects of the complaint, being continuing in nature, are viable under the 1971 suit letter, but the individual claim, being fixed in time, is barred.

Conclusions.

Title VII of the Civil Rights Act of 1964 has a built-in 90 day limitation in individual claims in that the charge

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4. Strangely, this letter and receipt were expunged from the EEOC file furnished counsel.

must be filed with the Equal Employment Opportunity Commission within 90 days after the alleged unlawful employment practice. 42 U.S.C. §2000e-5(d). Likewise, suit must be filed within 30 days after receipt of the "suit-letter." 42 U.S.C. §2000e-5(e). For the purposes of individual relief, in a long line of cases each has been held to be jurisdictional. See *Hutchings* v. *United States Industries, Inc.*, 428 F.2d 303 (5th Cir. 1970); *Culpepper* v. *Reynolds Metals Company*, 421 F.2d 888 (5th Cir. 1970); *Goodman* v. *City Products Corp.*, 425 F.2d 702 (6th Cir. 1970); *King* v. *Georgia Power Company*, 295 F. Supp. 943 (N.D. Ga. 1968); *Colbert* v. *H. K. Corporation*, 295 F. Supp. 1091 (N.D. Ga. 1968); *Boudreaux* v. *Baton Rouge Marine Contracting Co.*, 304 F. Supp. 240 (E.D. La. 1969). Both of these limitations apply to an isolated completed act of discrimination such as failure to transfer or discharge, because they are not continuing in nature. Upon their happening, each complainant is immediately entitled to file charges with the EEOC and the limitations begin to run. See various rulings of The General Counsel of the EEOC: Dec. 2, 1965, LRX 1892a; Nov. 26, 1965, LRX 1892a; Jan. 11, 1966, LRX 1892a. In this instance, the two individual acts occurred no later than May 15, 1968. They were duly reported. At the request of plaintiff, a suit letter on both individual complaints issued on March 21, 1969. However, no action was filed until May 5, 1971, over two years subsequent to the issuance of the all-important suit letter.

It is true that Franks did not see his notice personally. However, it was delivered as all of his other mail was delivered and the defendant ought not to be penalized on that account. Moreover, it has long been considered that the acts and omissions of an attorney are the acts and omissions of the client. In truth, Franks' failure was that of his selected attorney, but the court knows no solution for such

failure absent fraud. From the defendant's point of view, the delay has deprived it of an opportunity to settle the claims at an early stage or, at the least, to mitigate the dollar damages. It would be unfair to allow the stale claims to be resurrected by securing a second "suit letter" as was done here. Accordingly, the claims for individual relief are barred by failure to file within 30 days of the issuance of the suit letter of March 21, 1969. *Miller* v. *International Paper Co.*, 408 F.2d 283 (5th Cir. 1969).

The same result would be reached on the basis of §1983 jurisdiction because of the expiration of over two years between the "wrong" and the filing of the action in Georgia. E.g. *Shank* v. *Spruill*, 406 F.2d 756(1) (5th Cir. 1969). Ga. Code §3-704.

However, the class claims attacking the general employment practices of the defendant are viable under the second suit letter because they are continuing in nature. E.g. *Jenkins* v. *United Gas Co.*, 400 F.2d 28 (5th Cir. 1968); *Banks* v. *Lockheed-Georgia*, 46 F.R.D. 442 (N.D. Ga. June, 1968). Thus, they could be reported within 90-days of any day they exist and a suit letter thereon followed by a timely action would be allowed.

For the reasons stated, no back-pay or individual relief is awarded to plaintiff Franks and defendant is entitled to judgment thereon.

The Lee Claim.

Johnnie Lee, the intervenor is 38 years old. Prior to 1970, he had extensive experience driving trucks and tractor-trailers, principally in the Pensacola area. Included in his job history was some "over the road" experience with private carriers and some "city driver" experience with a common carrier. On or about January 5, 1970, he

applied at Bowman's Pensacola office for any kind of driving job. At the time, he was told there were no openings, but given a "city driver" application. He sent the application to the Atlanta Terminal on January 13, 1970, and it was returned with an "over-the-road" application. This application was also completed, but upon return on January 26, 1970, he was notified of his rejection. In February, 1970, he heard that a white road driver had been hired subsequent to his application and confirmed this personally. Thereupon, he filed a complaint with the EEOC. In early August, 1970, the company first notified him to go to the Birmingham Terminal. Following two additional letters he reported and was first hired as a road driver assigned to that Terminal on September 18, 1970. He worked continuously in that capacity until December 18, 1970, when he took a personal leave of absence on account of his wife's illness until early February, 1971. Upon return, he determined that his family situation could better be handled if he were assigned to the Atlanta Terminal. He contends that he asked for a transfer, but his testimony in this regard is extremely vague and the evidence fails in this respect. There is no written evidence of any such desire. Under the hardship rule regarding transfers, all must be approved by Mr. Dwight Rice, the company Director of Safety and Personnel in Atlanta and, as such, the virtual top supervisor of all road drivers. The Birmingham dispatcher positively testifies that no request, oral or written, was made to him and none was made to Rice. The court therefore must conclude that no valid request for transfer was made by Lee.

Lee continued to work out of the Birmingham Terminal after his return for several weeks using regularly Tractor No. 277. His service up until March, 1971, was entirely satisfactory to management and he had a good

record. Between March 11th and March 16th, Tractor No. 277 was given a complete 50,000 mile check at the Gadsden general garage, which services Birmingham. As a part of this process, the fuel pump is set so as to limit or "govern" the maximum RPM of the engine at moderate ranges of approximately 2000-2200. This, of course, limits the speed at which the unit can be driven. Following this procedure, Tractor No. 277 was checked and the fuel pump sealed at the proper RPM setting. The metal seal is designed to show if the fuel pump has been opened or tampered with outside of official garages. On or about March 16, 1971, Lee picked the unit up and made a regular run to the midwest. At about 6:00 A. M. on March 18th, he returned the Tractor to the Gadsden garage, and wrote a work order for additional repairs (failure to start and stiff gears), leaving it on the unit. Approximately one hour later, at 7:00 A. M. a B mechanic appeared on the scene and by 7:10 A. M. had checked in the unit. About 8:45, he commenced the repairs ordered by Lee. During the course of such repairs, it was necessary to accelerate the engine and in so doing, the mechanic noticed that the RPM was very high. He immediately called the shop foreman and together they rechecked the RPM which proved out at 2700-2800, far in excess of that officially allowed. Upon the foreman's instructions, the fuel pump was examined. The seal was broken and upon removal the fuel pump was found to have a block of wood, or "stinger" placed inside which effectively by-passed the governors. The incident was reported to the Birmingham safety supervisor, Woods. He immediately confronted Lee with the charge and it was denied. Nonetheless, Lee was immediately terminated under firm company policy which made discharge mandatory for any fuel pump tampering while the unit was in the driver's custody. The thrust of the policy is apparently aimed not only against personal guilt on the part of the driver, but

also to impose on the driver the responsibility to see that the governors are not overridden while the vehicle is in his custody.

Through the contractual grievance procedures, Lee's discharge was eventually submitted to binding arbitration. On October 25, 1971, the arbitrator found for Lee. In the finding (P #9), he rejected the company rule of absolute liability and concluded that while the "facts raise a strong inference approaching a presumption in the Company's favor", there was a "failure of proof" in that it did not exclude the possibility of other employees tampering with the fuel pump between 6:00 A. M. and the discovery of the stringer at 8:43 A. M. or during some other unknown period following the 50,000 mile check and Lee's receiving the unit. Reinstatement and back-pay were ordered. On October 29, 1971, reinstatement was tendered by the defendant and subsequently back-pay was forwarded to Lee in accordance with the contract. However, he refused to accept reinstatement at Birmingham and demands an assignment at Atlanta plus back pay until October 29, 1971.

The mandatory discharge rule for alteration of the fuel pump is one of long-standing. Between 1967 and trial, there were some 30 terminations or permitted resignations for violation of this rule. Some of the discharged drivers had received prior warnings for violations of other company rules not leading to mandatory discharge; but some, like Lee, had no prior warnings and possessed clean records at the time. There was no requisite of previous offense to the discharge. Most significantly, there is no indication and no evidence that any other driver, Black or white, was ever NOT discharged for violation of the standing rule. It is concluded that race was not a factor in the discharge of the intervenor Lee.

Between the filing of Lee's first application with Bowman on January 13, 1970, and his hiring on September 18, 1970, he would have been employed 248 days, or 35-½ weeks. On the basis of his later employment, he earned an average of $271.66 per week, or a total of $9,643.00 in projected gross earnings for the period. He actually earned $3,518.42 during that period. Thus, he lost a net amount of $6,124.58 by the Company's failure to hire when the application was first filed.

Conclusions.

As seen, the court finds that Lee was harmed by the failure to hire and is entitled to recover $6,124.58 by way of lost wages due to the discrimination involved. Conversely, the court finds that there was no racial discrimination in the failure to secure a transfer from Birmingham to Atlanta in February, 1971, and no racial discrimination in his discharge of March, 1971. As to the latter, the court is asked to assume with no proof whatsoever that Lee's unit was "doctored" by other employees with racial motivation and, more importantly, to assume that the first assumption was caused by racial motivation on the part of management. This the court cannot do. Consequently, no award is made for any period of time subsequent to March 18, 1971. The evidence is clear that Lee was treated the same as any other white driver under similar circumstances and race was no factor in the discharge.

The court is not bound by the arbitration award in any way. The theory adopted in this Circuit is that contractual grievance procedures are independent of all rights under the Act and the two may proceed concurrently without either affecting the other on the merits. *Culpepper* v. *Reynolds Metal Company*, 421 F.2d 888 (5th Cir. 1970); *Hutchings* v. *United States Industries, Inc.*, 428 F.2d 303

(5th Cir. 1970). This is especially true where race was given no consideration by the arbitrator. Whatever rights the intervenor presently has, if any, must be governed by the Collective Bargaining Agreement.

Accordingly, the intervenor Lee may recover of defendant Bowman Transportation Company the sum of $6,124.58. No interest is allowed.

IT IS SO ORDERED.

This the 28th day of June, 1972.

/s/ Sidney O. Smith, Jr.
Sidney O. Smith, Jr.
United States District Judge

Order and Decree of the United States District Court
Northern District of Georgia
Atlanta Division

FRANKS v. BOWMAN TRANSP. CO.

ORDER AND DECREE

(Filed June 29, 1972)

In accordance with the findings of the Court, the defendant, BOWMAN TRANSPORTATION COMPANY, and the defendants, INTERNATIONAL UNION OF DISTRICT 50, LOCAL NO. 13600, ALLIED AND TECHNICAL WORKERS OF THE UNITED STATES AND CANADA, and INTERNATIONAL UNION OF DISTRICT 50, ALLIED AND TECHNICAL WORKERS OF THE UNITED STATES AND CANADA, their officers, agents, employees, servants and all persons in active concert or participation with them, are hereby permanently *enjoined* and *restrained*

from discriminating against any Black applicant or Black employee of the defendant, Bowman Transportation Company at its Atlanta Terminal or elsewhere for over-the-road drivers in violation of Title VII of the Civil Rights Act of 1964.

In particular the defendants collectively are enjoined from implementing any seniority system or Collective Bargaining Agreement which conflicts with the rights of any member of an affected class as defined herein.

AFFECTED CLASSES.

The affected classes are defined by the court as follows:

CLASS 1. All Black employees at the Atlanta Terminal who were hired prior to August 15, 1968.

CLASS 2. All Black employees employed at the Atlanta Terminal in the Maintenance Department prior to May 1, 1970.

CLASS 3. All Black applicants who applied for positions as over-the-road drivers prior to January 1, 1972.

CLASS 4. All Black employees who applied to transfer to over-the-road driver positions prior to January 1, 1972.

ORDERS.

The members of CLASS 1 have all been restricted to jobs in the Tire Shop prior to August 15, 1968, by the racially discriminatory policies of the defendant company. Hereafter any member of the affected class who competes with a non-member in a bid to transfer or be promoted within the company shall be entitled to compete on the basis of company seniority until such date plus any departmental seniority thereafter, rather than departmental seniority only.

The members of CLASS 2 have been restricted to jobs in the Tire Shop and prevented from transferring to the Tractor and Trailer Shops within the Maintenance Department by the racially discriminating policies of the defendant company. All such members shall be notified of the right to bid within the department at the next annual bidding. If bids are lodged and the member is deemed qualified, he shall thereafter be credited with departmental seniority from the date of original employment in all future bidding.

The members of CLASS 3 have been effectively denied employment as over-the-road drivers prior to January 1, 1972. All Black applicants as revealed by the company records prior to such date shall be notified in writing of their right to be considered for employment by the company within 30 days and given 30 days thereafter to indicate their interest. If consideration is requested, then they shall be afforded priority in consideration over all other applicants until each such applicant, in chronological order, has been accepted or rejected by the company. Two applicants, Harbor and McLoughlin, shall be considered within 15 days by the company. In any such appplications, race shall not be used by the company as a means of denying employment to any applicant.

The members of CLASS 4, who sought to transfer from a job as "city driver" or elsewhere to road driver shall likewise be afforded priority in consideration for such employment, in chronological order along with the members of CLASS 3

A copy of this order, or such substituted order as agreed upon by counsel, shall be posted in a conspicuous

place in each department and sub-department of the Defendant, Bowman Transportation Company's Atlanta Terminal and in the office of each terminal and warehouse of the Defendant elsewhere for the period of 60 days. In addition, all bids shall hereafter be posted in each sub-department and shop in the Atlanta Terminal.

IT IS SO ORDERED.

This the 28th day of June, 1972.

/s/ Sidney O. Smith, Jr.
Sidney O. Smith, Jr.
United States District Judge

Judgment of the United States District Court
Northern District of Georgia
Atlanta Division

FRANKS v. BOWMAN TRANSP. CO.

JUDGMENT

(Filed July 14, 1972)

This action came on for trial before the Court, Honorable Sidney O. Smith, Jr., United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged as follows:

1. Each of the defendants herein is hereby enjoined from discriminating against any job applicant or employee of Bowman Transportation Company at its Atlanta Terminal or elsewhere for over-the-road drivers because of race in violation of 42 U.S.C. 2000e, *et seq.*

2. Each of the defendants is enjoined from implementing a seniority system which would prevent Black employees at Bowman's Atlanta Terminal from trans-

fering to formerly all white job classifications. Black employees hired by the Company before August 15, 1968 shall use company seniority prior to that date and departmental seniority thereafter in bidding on such jobs. Any employee hired into the Maintenance Department prior to May 1, 1970 who obtains a transfer to a formerly all white job within that department shall thereafter have credit for departmental seniority to his original hire date with Bowman Transportation.

3. Black applicants and present employees who sought positions as road drivers before January 1, 1972 shall be notified of their right to priority consideration for such jobs within 30 days.

4. Plaintiff Harold Franks shall take nothing for his back wages claim. Intervenor Johnny Lee shall recover $6,124.58 from defendant Bowman as lost wages resulting from the company's refusal to hire him, but shall recover nothing as a result of the company's discharge of him.

5. Attorneys for plaintiff and intervenor shall recover as attorneys' fees a total of $7,500.00, $6,000.00 of which shall be paid by defendant Bowman and $1,500.00 by the remaining defendants.

Dated at Atlanta, Georgia, this 14th day of July, 1972.

Ben H. Carter
Clerk

By: /s/ Jerry W. Evans
Deputy Clerk

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-728

HAROLD FRANKS and JOHNNIE LEE,

Petitioners,

v.

BOWMAN TRANSPORTATION COMPANY, INC., *et al.*,

Respondents.

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioners, Harold Franks and Johnnie Lee, respectfully submit this Supplemental Memorandum in Support of their Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, and reply herein to the Responses to the Petition.

At the time the petition was filed, two circuits had ruled on the issue presented by the petition. *Franks* v. *Bowman Transportation Company,* 495 F.2d 398 (5th Cir. 1974); *Waters* v. *Wisconsin Steel Works of Int'l Harvester Co.,* 502 F.2d 1309 (7th Cir. 1974).[1] Both Circuits held that Section 703(h), 42 U.S.C. § 2000e-2(h), precludes a grant of retroactive seniority to discriminatorily rejected job applicants. On January 25, 1975, the Sixth Circuit adopted a squarely contrary view in *Meadows* v. *Ford Motor Co., et al.,* —— F.2d ——, 9 EPD ¶ 9907.

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[1] Plaintiff Waters filed a Petition for a Writ of Certiorari on this and other issues on February 24, 1975, No. 74-1064.

Meadows was a sex-discrimination case under Title VII, which presented facts indistinguishable from those on which the petition herein is based. Plaintiff Meadows sued on behalf of a class of 31 female job applicants who had been rejected pursuant to a hiring standard found unlawful by the district court. The trial court granted the plaintiff class certain general relief similar to that allowed by the district court in *Franks*, including priority re-application rights. However, the district court denied Meadows' request for back pay and retroactive seniority to class members who were subsequently hired.

The Sixth Circuit reversed. Perhaps in light of the much-publicized prevalence of severe layoffs in the automobile industry, the court centered its discussion on the complexity of the retroactive-seniority issue in reduction-in-force situations.[2] Despite these equitable difficulties in applying the retroactive-seniority principle to layoffs, the Sixth Circuit rejected the argument that the provisions of Title VII preclude such relief. 9 EPD ¶ 9907 at pp. 6771-2. The Sixth Circuit cited to *Franks* as an example of the Fifth Circuit position it rejected, *id.*

Notwithstanding its serious reservations about applying retroactive seniority in a layoff situation, the Sixth Circuit saw no difficulty in authorizing such seniority for all other purposes, *id.* at p. 6772. To the extent that Petitioners' claim for seniority involves employment benefits rather than layoff rights—and the case as presented by the petition does not present *any* layoff issue—the Sixth Circuit would clearly grant petitioners their remedy on the merits, as well as agreeing with their position on the threshold question presented to this Court.

[2] See, the language quoted in the Union Respondents' Response at pp. 2-3 thereof.

The Third Circuit has spoken twice on the question presented by the petition, and, we respectfully submit, has spoken inconsistently. In *Jurinko* v. *Wiegand Co.*, 477 F.2d 1038 (3rd Cir. 1973), vac'd and rem'd on other grounds, 414 U.S. 970 (1973), the court ordered two unlawfully rejected female job applicants rehired with seniority from the date of their unlawful rejection. But in *Jersey Central Power & Light Co.* v. *Local Unions 372, 749, et al.*, —— F.2d ——, 9 EPD ¶ 9923 (3rd Cir., January 30, 1975), the Third Circuit appeared to adopt a different approach. Unlike *Jurinko* (and *Franks*), *Jersey Central* was not a Title VII hiring case; rather, *Jersey Central* was an employer's action for declaratory judgment brought in the context of an EEOC-approved affirmative action conciliation agreement. The Third Circuit held squarely in *Jersey Central* that § 703(h) of Title VII insulates, as a "bona fide seniority system," a layoff system based on plant seniority (date-of-employment) dates, *id.* at pp. 6860-2.[3]

Meadows, *Jurinko*, and *Jersey Central* demonstrate two further reasons for granting certiorari to resolve the question presented here. First, the appellate courts are deeply divided between and within themselves on the narrow issue presented by the petition: whether § 703(h) precludes seniority relief to discriminatorily rejected job applicants. Second, these cases demonstrate the crucial importance to litigants of the problems raised by the application of traditional seniority rules in a period of severe economic dislocation. Whether the federal courts, under Title VII, can even address themselves to those problems depends largely upon the disposition of the issue presented in the Petition.

[3] One member of the panel, Judge Van Dusen, wrote a concurring opinion which took strong issue with the Court's analysis of § 703(h) while concurring with the judgment on other grounds.

Neither Respondent, in its Brief, has argued in support of the Fifth Circuit's holding on the question presented by the petition. Respondent Bowman concedes that the Fifth Circuit "may be incorrect", while Respondent Union expresses "real doubts as to the correctness of the decision below" and concedes that certiorari should be granted to resolve the differences between the circuits on an important question, as set forth above.[4] Bowman attempts to shift the focus of the petition from the question presented, concerning Section 703(h), to a different question neither decided below nor presented in the petition. That question is: whether a district court may in its discretion refuse to grant retroactive seniority to unlawfully rejected applicants?

That interesting question, *cf. Meadows* v. *Ford Motor Co., supra,* is irrelevant to the petition. The district court did not exercise its discretion in this matter; it believed itself powerless to grant the relief requested (A. 54). The Court of Appeals affirmed on other grounds, but agreed that the relief requested was outside the court's jurisdiction (A. 30-A. 31). When a court denies relief on the basis of an erroneous view of the scope of its jurisdiction, the denial cannot be upheld as a proper exercise of its discretion.

[4] The Solicitor General, as amicus curiae, takes the position that the Fifth Circuit's construction of Section 703(h) was erroneous.

Respectfully submitted,

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No. 74-728

In the Supreme Court of the United States

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v.

BOWMAN TRANPORTATION COMPANY, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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In the Supreme Court of the United States

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MEMORANDUM FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

INTEREST OF THE AMICI CURIAE

The United States and the Equal Employment Opportunity Commission are responsible for the enforcement of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. 2000e, *et seq.*, which prohibits discriminatory employment practices. The decision of the court of appeals in this case, insofar as it restricts the scope of the relief that may be fashioned by district courts to remedy unlawful refusals to hire persons on account of their race, directly affects those responsibilities. The United States and the Commission accordingly participated as *amici curiae* in the court of appeals in support of petitioners' petition for rehearing.

STATEMENT

This class action was brought in the United States District Court for the Northern District of Georgia, challenging as racially discriminatory certain employment practices of the respondents, an interstate trucking company and a labor union. With respect to the matters pertinent here, the district court found that, prior to January 1972, the company followed an unlawful practice of excluding blacks from employment as over-the-road drivers on account of their race.[1]

The court enjoined further discrimination in violation of Title VII of the Civil Rights Act of 1964 (Pet. App. A65-A66) and ordered the company to give previously rejected black applicants priority in consideration for employment to fill vacancies as over-the-road drivers (*id.* at A67). It declined, however, to require that non-named members of the affected class be given back-pay awards or retroactive seniority credit when hired (*id.* at A54).

The court of appeals reversed the district court's denial of back-pay to non-named class members *(id.* at A37-A40) but affirmed its denial of retroactive seniority credit (*id.* at A29-A31). The court of appeals held that relief in the nature of seniority credit, requiring the creation of "constructive seniority for applicants who have never worked for the company" (*id.* at A30), is prohibited by Section 703(h) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(h), which provides that "it shall not be an unlawful employment practice for an employer to apply dif-

[1]The company followed "an unwritten policy against hiring Blacks" as over-the-road drivers prior to 1970 (Pet. App. A50; see also *id.* at A17). Although several blacks were hired for such jobs starting in 1970 (*id.* at A17-A18, A50), the district court found that black applicants were "effectively denied employment as over-the-road drivers prior to January 1, 1972" (*id.* at A67).

ferent standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system * * * ." "The discrimination which has taken place in a refusal to hire," the court of appeals stated, "does not affect the bona fides of the seniority system" (Pet. App. A30).

DISCUSSION

The Court should grant certiorari in this case to resolve the important question whether a district court, in fashioning a remedy for discriminatory refusals to hire, is precluded from granting seniority credit to qualifed persons who were illegally denied employment because of their race. The holding of the court of appeals that seniority credit is barred rests upon a misinterpretation of the provisions of the Civil Rights Act of 1964 and conflicts with recent decisions of other circuits. If left undisturbed, that holding would seriously impair the remedial effectiveness of the Act and hamper the enforcement efforts of the Department of Justice and the Equal Employment Opportunity Commission by unduly limiting the authority of the district courts to eliminate the effects of past hiring discrimination.

1. Insofar as the court of appeals held that Section 703(h) of the Act prohibits the granting of seniority credit to the victims of the company's discriminatory hiring policy, the decision conflicts with the Sixth Circuit's decision in *Meadows* v. *Ford Motor Co.*, Nos. 74-1258, *et al.*, decided January 24, 1975. The district court in *Meadows* found that the company had unlawfully denied production-line employment to women on account of their sex; but, like the district court in the present case, it declined to grant back-pay and seniority-credit relief to qualified members of the affected class of women applicants.

The Sixth Circuit held, however, that the Act's remedial objective—"to make the injured party whole to the extent that that can be done" (slip op. 8)— requires the district courts to grant back-pay and seniority-credit relief in appropriate cases, notwithstanding the practical difficulties that may be encountered in framing such relief. "There is," the court of appeals stated, "no prohibition to be found in the statute we construe in this case which prohibits retroactive seniority" (slip op. at 19). The court recognized that, "in dealing with job seniority," it is necessary to consider not only the interests of those who were denied employment on account of their sex, but also "the interests of the workers who might be displaced as well as the interests of the employer in retaining an experienced work force" (*ibid.*). It stated, however, that "[w]e do not assume, as our brethren in the Fifth Circuit appear to * * * , that such reconciliation is impossible" *(ibid.)*.[2]

The decision in the present case also conflicts with the Third Circuit's decision in *Jurinko* v. *Edwin L. Wiegand Co.*, 477 F. 2d 1038, vacated and remanded on other grounds, 414 U.S. 970. In that case, an employer refused to hire two women job applicants because of their sex.[3]

[2]The Sixth Circuit recognized, moreover, that the problems involved in assigning seniority credit for purposes of lay-offs and job-bidding are reduced or eliminated in the context of assigning such credit for purposes of "the fringe benefits of employment" (slip op. at 19). "Where vacation schedules or pension rights (or other fringe benefits) are determined by date of hire, we perceive no reason why that date in these cases should be other than the date which the trial court fixes as the date when the employee would have been hired, absent the illegal hiring practice which the District Court has identified and enjoined" (slip op. at 19-20).

[3]Both women had previously been employed by the company for several years prior to December 1953, but that fact did not bear upon the court of appeals' disposition of the issues relating to the company's discriminatory refusal to rehire them in 1966. The women's legal posture was no different from that of new applicants who had never been employed by the company.

The relief granted by the district court did not include seniority credit, but the court of appeals directed the district court on remand "to expand the award to the plaintiffs to include seniority" (477 F. 2d at 1047). The court of appeals stated *(id.* at 1046):

> We can perceive no basis for the trial court to have refused to award back seniority or for its conclusion that "the plaintiffs are to be offered employment in production with the company, of course, as new employees." Seniority is, of course, of great importance to production workers for it determines both opportunities for job advancement and the order of layoff in the case of a reduction in a company's operating forces. It is our view that the plaintiffs are entitled to seniority and back pay dating from the time of the discriminatory employment practice up to the time they are actually reinstated. Only in this way will the present effects of the past discrimination be eliminated.

Retroactive seniority to place identified victims of hiring discrimination in the position they would have been in but for the discrimination has also been held proper by some district courts[4] and has been included in consent decrees negotiated by the Department of Justice.[5]

[4]See, *e.g.*, *United States* v. *Lee Way Motor Freight, Inc.*, 7 EPD para. 9066, p. 6500 (W.D. Okla.); cf. *Dobbins* v. *Local 212, International Brotherhood of Electrical Workers*, 292 F. Supp. 413, 450-451 (S.D. Ohio), affirmed as modified, 472 F. 2d 634 (C.A. 6).

[5]*E.g. United States* v. *Roadway Express, Inc.*, C.A. No. C-68-321 (N.D. Ohio) (consent decree entered September 1, 1970, partially reported at 2 EPD para. 10,295, p. 1176 affirmed, 457 F. 2d 854 (C.A. 6); *United States* v. *Navajo Freight Lines, Inc.*, C.A. No. 72-116-MML (C.D. Cal.) (supplemental order to consent decree entered January 15, 1973); *United States* v. *Pilot Freight Carriers, Inc.*, C.A. No. C-143-WS-71 (M.D. N.C. (consent decree entered October 31, 1972). See also *United States* v. *Georgia Power Co.*, 7 EPD para. 9167 (N.D. Ga.) (parties agreed to order on remand from 474 F.2d 906 (C.A. 5)).

2. The Fifth Circuit's flat prohibition against the granting of any form of seniority credit is an unwarranted departure from the remedial purposes of Title VII. Section 706(g) of the Act, 42 U.S.C. (Supp. III) 2000e-5(g), gives the courts broad remedial authority; it permits them, upon a finding that a violation exists, to "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay * * *, or any other equitable relief as the court deems appropriate." When a violation is found, the Act's objective, as the court of appeals recognized, is "to remedy the effects of past discrimination" and "to make the discriminatee whole as far as possible" (Pet. App. A23-A24). See *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F. 2d 1364, 1375, 1377 (C.A.5); *Head* v. *Timken Roller Bearing Co.*, 486 F. 2d 870, 876-877 (C.A. 6); *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 802 (C.A. 4); *Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711, 720 (C.A. 7).[6]

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[6]A section-by-section analysis of the 1972 amendments to the Act, presented to the House and the Senate at the time the Conference Report on those amendments was submitted to each body (118 Cong. Rec. 7166-7169, 7563-7567), states with respect to the present Section 706(g) (*id.* at 7168, 7565):

> The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present Section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.

The effect of the court's holding in the present case, however, would be to bar full relief to persons denied employment because of their race and to allow perpetuation of the effects of the company's discriminatory refusals to hire. The victims of the company's racially discriminatory hiring policy would be permanently disfavored, because their seniority status—for purposes of lay-offs, job-bidding, etc.—would be forever subordinated to the seniority status of whites who were hired in their place.

Section 703(h) of the Act, on which the court of appeals rested its decision in this case, is not a bar to an award of seniority credit. That Section addresses only what constitutes an unlawful employment practice; it does not limit the court's remedial power to prescribe effective relief once a violation is established. See, *e.g.*, *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va.). Moreover, granting appropriate seniority-credit relief in this case would not eliminate the existing seniority system of the company or the union. It would merely give the qualified members of the affected class their rightful place within that system.

The issue here is a narrow one. It is not whether full seniority credit for all purposes must be granted to all members of the affected class who are ultimately hired by the company; it is whether some form of seniority credit *may* be granted in appropriate circumstances to eliminate the effects of past hiring discrimination. The resolution of that issue will not require this Court to determine the precise form that such relief should take in this case. As the Sixth Circuit recognized in *Meadows, supra*, that task, which requires a careful consideration of all the competing interests at stake, properly "lies in the first instance with the District Judge" (slip op. at 19).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1975.

Supreme Court, U. S.
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APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

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PETITION FOR CERTIORARI FILED DECEMBER 10, 1974
CERTIORARI GRANTED MARCH 24, 1975

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Relevant Docket Entries

May 5, 1971	Plaintiff's complaint filed in United States District Court for the Northern District of Georgia, Atlanta Division.
May 20, 1971	Answer of defendant Bowman Transportation Company filed.
May 25, 1971	Answer of defendants, International Union of District 50 and its Local No. 13600 filed.
July 21, 1971	Intervenor's motion to intervene and proposed complaint filed.
July 21, 1971	Order of District Court allowing intervention filed.
August 10, 1971	Answer of defendant Bowman to Intervenor's complaint filed.
August 25, 1971	Answer of defendant Unions to Intervenor's complaint filed.
March 28-30, 1972	Trial proceedings in District Court.
April 26, 1972	Plaintiff and Intervenor's Proposed Advisory Judgment, Order and Decree filed.
June 29, 1972	Opinion, Order and Decree of District Court filed.
July 14, 1972	Judgment of District Court filed.

Relevant Docket Entries

July 26, 1972	Notice of Appeal by Plaintiff and Intervenor filed.
August 3, 1972	Order amending judgment filed.
October 18, 1972	Record on Appeal filed in United States Court of Appeals for the Fifth Circuit.
June 3, 1974	Opinion and Judgment of Court of Appeals filed.
July 1, 1974	Petition for Rehearing filed on behalf of Plaintiff and Intervenor.
September 12, 1974	Order denying Petition for Rehearing filed.
December 10, 1974	Petition for a Writ of Certiorari filed in United States Supreme Court.
December 11, 1974	Case docketed in United States Supreme Court.
March 24, 1975	Order granting Petition for a Writ of Certiorari filed.

Note Regarding Opinions Below

Pursuant to the "Memorandum re Printing" of the Clerk, the Opinions, Orders, and Judgments of the Courts Below, having been printed in an Appendix to the Petition for a Writ of Certiorari, will not be reprinted in this Appendix. Those opinions and their location in the Appendix to the Petition are as follows:

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Complaint

[5] IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
CIVIL ACTION NO. 15086

HAROLD FRANKS,

Plaintiff,

v.

BOWMAN TRANSPORTATION COMPANY; INTERNATIONAL UNION OF DISTRICT 50, LOCAL NO. 13600, ALLIED AND TECHNICAL WORKERS OF THE UNITED STATES AND CANADA; and, INTERNATIONAL UNION OF DISTRICT 50, ALLIED AND TECHNICAL WORKERS OF THE UNITED STATES AND CANADA,

Defendants.

I.

Jurisdiction of this Court is invoked pursuant to 28 United States Code, §1343. This is a suit in equity authorized and instituted pursuant to Title VII of the Civil Rights Act of 1964, 42 United States Code, §2000e, *et seq.* and 42 U.S.C., §1983. The jurisdiction of this Court is invoked to secure protection of and to redress deprivation of rights secured by (a) Title VII of the Civil Rights Act of 1964, 42 United States Code, §2000e, providing for injunctive and other relief against racial discrimination in employment and (b) 42 United States Code, §1981, providing for equal rights of citizens and all persons within the jurisdiction of the United States.

Complaint

This is also a suit for a declaratory judgment pursuant to the provisions of §2201, *et seq.*, 28 United States Code, declaring and adjudging that the unlawful employment practices alleged here [6] in deprive and withhold from plaintiff and the class which plaintiff represents, rights secured by §§1981 and 2000e, *et seq.*, 42 United States Code. There exists between the parties hereto an actual controversy of a justiciable nature.

II.

Plaintiff brings this action on his behalf and on behalf of all others similarly situated pursuant to Rule 23(a), and (b), (1) (2), Federal Rules of Civil Procedure. The class is so numerous that joinder of all members is impracticable. There are questions of law and fact common to the class with respect to the terms, conditions, or privileges of employment, or employment opportunities, or which otherwise adversely affect their status as employees on the basis of their race and color. The claims of the named plaintiff are typical of the claims of the class. The named plaintiff will fairly and adequately protect the interests of the class. The prosecution of separate actions by individual members of the class would create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests; and the defendants herein have acted or refused to act on grounds generally applicable to the class, thereby making appropriate the final injunctive and declaratory relief sought herein with respect to the class as a whole.

III.

This is a proceeding for a preliminary and permanent injunction, as well as a declaratory judgment, restraining and enjoining defendants from maintaining any policy, practice, custom, and usage of withholding, denying, attempting to deprive and otherwise [7] interfere with the rights of plaintiff and his class to equal opportunities on the grounds of race or color.

IV.

Plaintiff, HAROLD FRANKS, is a Black citizen of the United States and the State of Georgia, residing in Morrow, Georgia, within the jurisdiction of this Court.

V.

(A.) Defendant BOWMAN TRANSPORTATION COMPANY (hereinafter, sometimes BOWMAN) is a common carrier of general commodities with intrastate authority in Georgia and interstate authority in other states. Defendant has a terminal in Atlanta, Georgia, within the jurisdiction of this Court. Defendant employs more than 25 persons and is covered by Title VII of the Civil Rights Act of 1964;

(B.) Defendant LOCAL No. 13600, International Union of District 50, Allied and Technical Workers of the United States and Canada (hereinafter sometimes LOCAL 13600) represents employees at defendant's Atlanta terminal. It represents more than 25 persons and is covered by Title VII of the Civil Rights Act of 1964;

(C.) Defendant INTERNATIONAL UNION OF ALLIED AND TECHNICAL WORKERS OF THE UNITED STATES AND CANADA (hereinafter, sometimes INTERNATIONAL) is the International Union of which LOCAL No. 13600 is a part. Its headquarters are located in Washington, D.C., and it is covered by Title VII of the Civil Rights Act of 1964.

VI.

Plaintiff, while employed with defendant BOWMAN, on March 25, 1968, filed charges with the federal Equal Employment Opportunities Commission alleging that BOWMAN was maintaining a system of distinct job classifications for Blacks, that BOWMAN discriminated against him by failing to promote him, and that BOWMAN [8] maintained a system of segregated washrooms. The charges were served by the EEOC on BOWMAN on April 23, 1968. Thereafter, on May 10, 1968, plaintiff was terminated by defendant for allegedly breaking a company rule, albeit a rule the violation of which had caused the Company no injury and was not cause to terminate persons in the past.

VII.

Defendant BOWMAN maintains three divisions with separate seniority lists at its Atlanta terminal. At the time of plaintiff's employment, no Blacks were employed in the Over the Road division or in the Dock Work division. Blacks were employed only in the Maintenance division. One cannot transfer from one division to another without loss of all seniority. Only three percent of BOWMAN's Atlanta work force was Black during plaintiff's employment.

VIII.

None of BOWMAN's Black employees were supervisors or employed in positions of responsibility during plaintiff's employment with BOWMAN. Prior to his initial EEOC

complaint against Bowman, plaintiff unsuccessfully sought upgrading from tirechanger to diesel mechanic, but was denied the same. Denial of promotion to plaintiff was part of a pattern and practice of restricting the promotional or advancement opportunities of Blacks working for Bowman.

IX.

Washrooms at Bowman's Atlanta terminal were assigned according to divisions, with the result, during plaintiff's employment, that the washrooms in the all-white divisions were also all-white.

[9] X.

Following plaintiff's termination on May 10, 1968, he sought the assistance of Local 13600 and the International but received none to assist him in grieving against the termination. Failure of the union to properly represent plaintiff because of his race is in violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §1981.

XI.

The act of Bowman in discharging plaintiff in the manner described in paragraph VI, *supra*, was an illegal discharge based upon plaintiff's race and because he had filed charges with and assisted in investigation of those charges with the EEOC, all in violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §1981.

XII.

The acts of Bowman, Local 13600, and the International in maintaining a seniority system whereby (a) Blacks were

confined to one division and (b) persons cannot transfer from division to division without loss of seniority is illegal under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §1981.

XIII.

The acts of Bowman, Local 13600, and the International in maintaining a system whereby plaintiff and other Blacks were confined to low-paying, non-responsible jobs without opportunity for promotion or adancement is illegal under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §1981.

XIV.

The acts of Bowman, Local 13600 and the International described in paragraphs VII, VIII, IX, XII and XIII, *supra*, affect the [10] class of other Black employees, present, past, and future of Bowman, and who are, were or may be represented by Local 13600 or the International, in that the acts described in those paragraphs are discrimination against the class of persons represented by plaintiff because of their race or color, in violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §1981.

XV.

As a result of his illegal discharge, plaintiff was unemployed; received a hospital bill for his wife's pregnancy that would have been covered by his insurance with defendant Bowman, but was not as a result of his termination; lost two weeks paid vacation; and was employed for a number of years at a lower wage than he earned while employed by Bowman.

XVI.

Neither the State of Georgia, the County of Fulton, nor the City of Atlanta has a law prohibiting the unlawful practices alleged herein.

XVII.

On or about March 25, 1968, plaintiff filed a complaint with the EEOC complaining of his inability to be promoted and of segregated divisions and washrooms. On May 13, 1968, plaintiff filed a complaint with the EEOC complaining of his discharge because he previously filed a discrimination complaint with the EEOC. On June 1, 1968, plaintiff filed a complaint with the EEOC charging defendants LOCAL 13600 and INTERNATIONAL with failure to fairly represent him after his discharge. On March 2 and March 5, 1971, plaintiff amended his charges against BOWMAN and against LOCAL 13600 and the INTERNATIONAL. All of said charges and amended charges were made under oath and within the time allowed by law. The charges and amended charges were duly served by the EEOC [11] upon defendants. In a letter dated April 14, 1971, the EEOC, pursuant to plaintiff's request, informed him that he might, within thirty days, institute a civil action under Title VII in the appropriate court; 42 U.S.C. §2000e-5(e).

XVIII.

Plaintiff has no plain, adequate, or complete remedy at law to redress the wrongs alleged, and this suit for a preliminary injunction is his only means of securing adequate relief. Plaintiff and the class he represents are now suffering and will continue to suffer irreparable injury from

defendant's policies, practices, customs, and usages, as set forth herein.

WHEREFORE, plaintiff respectfully prays that this Court advance this cause on the docket, order a speedy hearing at the earliest practicable date, and cause this case to be in every way expedited, and upon such hearing, to:

(1) Grant plaintiff and the class he represents a preliminary and permanent injunction, enjoining and restraining defendant BOWMAN, LOCAL 13600 and INTERNATIONAL, their agents, successors, employees, attorneys, and those acting in concert with them and at their direction, from continuing or maintaining any policy, practice, custom and usage of denying, abridging, withholding, conditioning, limiting, restricting, or otherwise interfering with the right of plaintiff and his class to equal employment opportunities on the basis of race or color;

(2) Grant plaintiff and the class he represents a preliminary and permanent injunction enjoining and restraining defendants BOWMAN, LOCAL 13600 and INTERNATIONAL, their agents, employees, attorneys, and those acting in concert with them and at their direction, from continuing or maintaining any policy, practice, [12] custom and usage of discriminating against the plaintiff and the class he represents by depriving and withholding from them opportunities for employment, for equal working conditions, for equal pay, for equal promotional opportunities, and for the right to seek redress of grievances under Title VII on the basis of their race or color;

(3) Grant plaintiff, HAROLD FRANKS, an award of money equal to the difference between what he would have earned, but for the acts of discrimination complained of herein,

and what he actually earned as a consequence of such discrimination;

(4) Grant plaintiff, HAROLD FRANKS, restoration of the employment with defendant from which he was wrongfully terminated, together with restoration of any seniority and other benefits to him as though he had been continuously employed by defendant;

(5) Grant plaintiff and the class he represents a declaratory judgment declaring and adjudging that the discriminatory acts of defendants BOWMAN, LOCAL 13600, and INTERNATIONAL alleged herein constitute violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C., §2000e *et seq.*, and 42 U.S.C. §1981;

(6) Allow plaintiff his costs herein, including reasonable attorney's fees and such other additional relief as may appear to be equitable and just.

/s/ PETER E. RINDSKOPF
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[13]

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New York, New York 10019
Attorneys for Plaintiff

[Return on Service Omitted in Printing]

Motion to Intervene

[48] UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

[Title Omitted in Printing]

JOHNNIE LEE moves for leave to intervene as a plaintiff in this action, in order to assert the claim set forth in his intervention complaint, of which a copy is hereto attached on the ground that common questions of law and fact of racial discrimination by the defendant are involved.

/s/ PETER E. RINDSKOPF
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MORRIS J. BALLER
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Attorneys for Intervenor

Intervener's Complaint

[50] UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

[Title Omitted in Printing]

I.

Intervener adopts and incorporates by reference paragraphs I, II, III, V, VII, VIII, IX, XII, XIII, XIV, XVI, and XVIII of plaintiff's complaint in the original action above.

II.

Intervener, JOHNNIE LEE, is a Black citizen of the United States and the State of Florida, residing in the City of Pensacola, Florida.

III.

Intervener applied for a job as an over-the-road driver with defendant in January, 1970. On February 13, 1970, intervener was told by defendant company's Atlanta office that his application was rejected because, "Application was not accepted at this time." This unsuccessful application was preceded by an application in November, 1969, which intervener sent in without attaching thereto a photograph of himself. That first application was rejected [51] on the grounds that "you have filled out the wrong application for a road driver." Defendant company does not require photographs on its local driver applications but does require them for long distance or over-the-road jobs.

Intervener's Complaint

IV.

Intervener had over ten years of experience as a driver. Within 30 days of the rejection of intervener's application, defendant hired nine (9) white over-the-road drivers. From January 2 through June 8, 1970, defendant company hired five white drivers with less than one year's driving experience.

V.

The policy and practice of defendant company in requiring photographs of applicants for long distance driving jobs (although not for local driving jobs) is part of a policy, custom, practice and usage maintained by defendant company and defendant unions in restricting the opportunities for intervener and other members of his race and class to become over-the-road drivers and as such is forbidden by Title VII of the Civil Rights Act of 1964 and 42 U.S.C., Sec. 1981.

VI.

Rejection of intervener's application, with photograph attached, was part of the policy, custom, practice, and usage of defendants in restricting the opportunities of intervener and other members of his race and class to become over-the-road drivers and as such is forbidden by Title VII of the Civil Rights Act of 1964, and 42 U.S.C., Sec. 1981.

VII.

On February 26, 1970, within the time required by law from the company's illegal rejection of his application,

intervener filed a charge with the federal EEOC. The charge was served on [52] defendant company on June 16, 1970. Thereafter, in August, 1970, defendant company (in a letter from counsel in this case) offered plaintiff a job as an over-the-road driver in Alabama, which offer he accepted in September 1970.

VIII.

On March 18, 1971, intervener was accused of violating a company rule by tampering with the engine of his truck and discharged. Intervener did not tamper with his truck engine nor permit anyone to do so in his behalf. Enforcement of the company rule against intervener in these circumstances was part of the custom, practice, policy and usage of defendants in restricting the number of Blacks as over-the-road drivers, in violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C., Sec. 1981.

IX.

Defendant unions failed to secure intervener's restoration to his job after his discharge, in keeping with their policy, custom and usage of restricting the over-the-road jobs to whites, in violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C., Sec. 1981.

X.

Subsequent to his discharge, intervener filed a timely charge with the EEOC, which charges were served upon defendants. On June 22 and June 30, 1971, intervener received letters from the EEOC, pursuant to his request, authorizing him to institute within thirty days a civil ac-

tion in the appropriate federal district court upon the charges previously filed with the EEOC.

WHEREFORE, in addition to the relief prayed for in paragraphs 1, 2, 5, and 6 of the complaint in the principal action herein, intervener prays that this Court:

[53] 1. Grant intervener judgment against defendants for the amount of back wages he lost because of their discriminatory actions (a) in refusing to hire him from November, 1969, until September, 1970, and (b) in discharging him in March, 1971, until the present;

2. Enjoin and restrain defendants, their employees, agents, servants, attorneys, and all those in active concert and participation with them from (a) continuing to discriminate in the hiring and firing of Blacks in the positions with defendant company; (b) continuing the practice of requiring submission of a photograph to accompany job applications for employment with defendant company; and (c) continuing the practice of defendant company of failing to properly retain and of defendant unions to properly represent Black employees of defendant company;

3. Declare that the practices of defendants enumerated in the complaint are illegal racial discrimination in violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C., Section 1981.

Intervener's Complaint

/s/ Peter E. Rindskopf
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Attorneys for Intervenor

[Certificate of Service Omitted in Printing]

Order

[54] United States District Court
For the Northern District of Georgia

[Title Omitted in Printing]

The above motion to intervene and intervener's complaint read and considered, It Is Hereby Ordered That they are allowed filed and allowed, subject to objection.

Dated this 20th day of July, 1971.

/s/ Sidney O. Smith
United States District Judge

Plaintiff and Intervenor's Proposed Advisory Judgment, Order and Decree

[1113] UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

[Title Omitted in Printing]

Upon the Findings of Fact and Conclusions of Law entered in this action in compliance with Rule 52, Fed. R. Civ. P., and on all the premises, the Court enters the following order and decree:

• • • • •

[1117] • • •

6. All seniority, promotion, transfer and layoff provisions of the present collective bargaining agreement between defendants are hereby modified, and all future agreements shall be conformed, to incorporate the provisions of this decree.

C. *Hiring and Recruitment*

7. Members of Affected Classes 3 and 4 who were denied employment shall have rights to re-apply for employment in the same jobs for which they originally applied, as follows:

a) Each such identifiable person shall be listed by name, last known address, date and job applied for, by defendant Bowman. This list shall be filed in Court. In the case of rejected road driver applicants, the list shall include all those apparently qualified individuals whose applications were put in evidence at trial herein, or whose applications were summarized by documentary material in evidence at the trial. An individual shall be deemed "apparently qualified" if his application shows a claim of one year or more of tractor-trailer driving experience. Such persons may be eliminated from consideration only if the application form or subsequent inquiry shows affirmative reason to believe the person unqualified for the road driving job.

b) Bowman shall notify each person on the list that this Court has found its hiring practices with respect to the job, date, and place of that individual's application to have been racially [1118] discriminatory, and has ordered that such practices cease forthwith.

c) Bowman shall specifically invite each person on the list to re-apply within thirty (30) days for the job originally sought, and shall offer to retain applications on file for ninety (90) days pending the availability of job vacancies. Applicants shall be invited to renew their applicaions for a further ninety (90) days by a simple notice of renewal. In the case of road drivers, however, applications shall be retained on file for one year.

d) Bowman's notice to rejected applicants for all jobs shall contain a simple form which may be filled out and returned to indicate interest in re-applying. The form shall be filed in court prior to its distribution to class members.

e) Bowman shall list, for each job category or department, all persons in the Affected Classes 3 and 4 who respond within thirty (30) days indicating an interest in hiring. The list shall be arranged according to the dates of original application for the job, and shall be filed in court.

Plaintiff and Intervenor's Proposed Advisory Judgment, Order and Decree

f) If, after thirty (30) days from the mailing of notice to re-apply, any member of Affected Classes 3 or 4 has not re-applied for hiring, he shall be deemed to have waived his right to priority consideration for the job which he was previously denied.

g) If no member of Affected Classes 3 and 4 who is [1119] qualified and competent for the position applied for has re-applied for a job vacancy in a particular job, defendant Bowman may fill this vacancy by hiring a new employee, subject to the hiring provisions *infra,* or by transferring a current employee, subject to the provisions of this decree. If one or more qualified and competent persons remains on the list for the particular job, the listed person with the earliest original application date shall be offered a reasonable opportunity to accept the job. If that person declines the opportunity, his priority re-application rights shall cease.

h) Persons in Affected Classes 3 and 4 rehired pursuant to these provisions shall, upon rehiring, assume applicable seniority from the date on which their earlier application was rejected.

i) Nothing in this paragraph in any way affects the Company's right to insist that hirees possess adequate qualifications and competency to perform their jobs, as measured by objective, legitimate, and non-discriminatory standards.

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[Certificate of Service Omitted in Printing]

Transcript of Proceedings

[1202] UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
CIVIL ACTION NUMBER 15086

HAROLD FRANKS,

Plaintiff,

BOWMAN TRANSPORTATION COMPANY, ET AL.,

Defendants,

JOHNNIE LEE,

Plaintiff-Intervenor.

Transcript of proceedings had before the Honorable SIDNEY O. SMITH, JR., Judge, United States District Court, on March 28, 29, and 30, 1972, in Atlanta, Georgia.

APPEARANCES OF COUNSEL:

For the Plaintiff and
Plaintiff-Intervenor:

Mrs. Elizabeth Rindskopf
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Testimony of Dwight Rice

For Defendant Bowman:

William M. Pate
Atlanta Federal Savings Building
Atlanta, Georgia

For Defendant Union:

Robert B. Hocutt
Equitable Building
Atlanta, Georgia

• • • • •

[1212]

DWIGHT RICE called as a witness by the plaintiffs after having first been duly sworn testified as follows:

Cross Examination by Mr. Baller:

Q. Please state your name. A. Dwight Rice.

Q. And your address? [1213] A. 2333 Perrian Drive, Decatur, Georgia.

Q. What is your race, Mr. Rice? A. Caucasian.

Q. By whom are you employed? A. Bowman Transportation, Inc.

Q. And what is your position with Bowman? A. Director of Safety and Personnel.

Q. Are you representing Bowman in this case? A. Yes, sir.

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Q. When were you first employed by Bowman, Mr. Rice? A. April 1959.

Q. And what was your job at that time? A. Director of Safety and Personnel.

Q. Is that the same job you now hold? A. Yes, sir.

Testimony of Dwight Rice

Q. And have you held that job from 1959 to present? A. Yes.

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[1214] • • •

Q. What were your duties in 1959 when you first assumed your present job? A. Basically the same as they are now.

Q. And what are those? A. The responsibility for safety for the entire company, the primary responsibility for the employment of road drivers.

Q. Are you involved in the employment of any other workers besides road drivers? A. Other than certain requirements for city drivers.

Q. Now what are your duties in your job at the present time? A. Supervise the safety supervisors in my department and establish guidelines of hiring and discharge.

Q. Are you personally involved in hiring and discharge decisions, at this time? A. I'm not personally involved in hiring, I am still involved in discharge.

[1215] Q. When did you cease to be personally involved in hiring? A. I would estimate three to four years ago.

Q. That would be about 1968, approximately. A. Approximately.

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[1229] Q. Now, with regard to the hiring of over-the-road [1230] drivers, Mr. Rice, could you tell me what your personal duties and responsibilities have been since the time of your employment? A. Well, number one, to make sure they complied with the Federal requirement of the ICC and most recently Department of Transportation. Second, trying to establish guide lines to hire people that would have a successful driving record on the road.

Q. Have you been involved in hiring decisions regarding individual applicants? A. Yes.

Q. And during what period were you involved in those kind of decisions? A. From 1959 until approximately 1968.

Q. Where were you located yourself during those times? A. 1959 I was located in Gadsden, Alabama. In 1961, I believe, I moved to Atlanta, Georgia.

Q. Now, during that entire period did you have the final responsibility for hiring, or rejecting Road Driver applicants? A. I didn't personally interview and review every applicant, no.

Q. Did the people who interviewed and reviewed applicants work for you? A. Yes.

[1231] Q. So that you were responsible ultimately for those decisions, is that correct? A. I suppose that's correct.

Q. Did you hire and interview some of the people yourself, during that period of time? A. Yes.

Q. During that period of time, were you hiring Road Drivers for the whole system, or only for certain terminals? A. Well, actually the Road drivers operate through the whole system, other than bid run drivers, who just operate between two points.

Q. Were you then hiring drivers for placement throughout the system?

The Court: Yes.

The Witness: When you say placement, it sounds like you're talking about putting them some place.

By Mr. Baller:

Q. Did anybody else's office hire drivers in the system? A. We have an office in Birmingham, Charlotte, and Richmond that also hired road drivers.

Q. And since when have those various offices been hiring drivers? A. In Richmond I suppose eight or ten years, Birmingham since '69, Charlotte probably a year or so prior to that.

[1232] Q. And prior to the time the hiring offices were set up in those other terminals, then I understand your office in Gadsden and Atlanta was responsible for hiring for those terminals? A. You keep saying for those terminals, and I am saying we are not hiring a road driver here to run out of some other terminal.

Q. How many road drivers did Bowman employ in 1959, when you arrived? A. They had 240.

Q. And how many did they employ in 1968? A. I would estimate between 450 and 500.

Q. Can you make any kind of estimate of how many road drivers were hired during this period, say on an average annual basis? A. From 1959—

Q. To 1968. A. It would just be a guess, possibly 50 in 1959 up to 200 to 300 in '68.

The Court: He maybe asking what sort of turnover you have. Let's assume you have 450 jobs, approximately how many a year do you have to fill?

The Witness: Presently, I believe, about 250.

The Court: About half.

The Witness: About half.

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[1235] • • •

Q. Now, at the time that you made decisions on whether or not to hire a driver, did you know the driver's race? A. If I saw him, or his picture was attached to the application.

[1236] Q. Did the application require a picture? A. Yes.

Q. Has that been true throughout the period? A. I'd say since about 1960 or '61.

Q. Would you also know the man's race if some notation has been made on his application? A. Well, I guess.

Q. Did you in fact know the race of every man you hired at the time you hired him? A. I knew the race of the people I hired, yes.

Q. Now, during this period of 1959 to 1968, did Bowman hire any black drivers to your knowledge? A. No black road drivers.

Q. Did they hire any black city drivers? A. Yes.

Q. When was that? A. Well, I'm not really familiar with all the terminal personnel, but I know we had blacks employed in Memphis and Charleston and Charlotte in probably '61 or '62.

Q. Did Bowman hire any black city drivers in Atlanta during this period? A. I really don't know.

Q. Now, getting back to the road drivers, do you know whether Bowman had any kind of policy against hiring black road drivers during this period? [1237] A. We just hadn't hired any.

Q. Did you understand this to be true when you arrived? A. We were not, apparently they were not hiring blacks when I arrived, that's true.

Q. You say apparently, go on. A. Well, I mean I don't know other than the drivers force that they had when I came there, I don't know what they had done prior to that.

Q. What was that driver force when you came? A. Well, the road drivers were all white.

Q. Did you discuss this matter with anyone else in the Bowman management? A. I don't think so at that time.

Q. Did you discuss it with them later? A. I'm sure I have later.

Q. Can you remember who you discussed it with? A. I'm sure I have discussed it with most of the officers at one time or another.

Q. And what was the nature of your discussion with these officers? A. Well due to the fact that we had about a 50% double operation in bunkrooms and shower facilities at many of the terminals, and due to the comments of our white drivers, we didn't think it feasible to hire them.

Q. You didn't think it was feasible to hire black [1238] drivers, you are saying? A. Correct.

Q. Why, exactly, was it not feasible to hire black drivers? A. White drivers had told us they would quit if we put them with them, if we put them in the bunkroom or used the shower facilities.

Q. You say you had about 50% double runs? A. Generally so.

Q. And I presume the other 50% were then single runs? A. Single operations.

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[1239] • • •

Q. Fine, let me pass that and ask you, did you have any black applicants in 1959 to 1968? A. Well, I'm sure we did.

Q. Do you know how many? A. No idea.

Q. Would you say you had as many as one black applicant a month? A. It's possible.

Q. Would you say you had possibly as many as one a week? [1240] A. I doubt if we did early in those years.

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Q. In the later years, would you have had as many as one black applicant per week? A. It's really hard to say.

Q. In any event, you saw a number of applications from blacks? A. I'm sure I saw applications from blacks.

Q. When you saw applications from blacks, did you consider those applications? A. We looked at them and in some cases, checked them out to see how they checked out.

Q. When you checked out the references, if the references checked out, would you then consider them for hiring? A. Well, it goes back to what I said before, we didn't know how we could hire a black and put him with a white driver and not lose the white driver.

Q. I think what you are telling me is that you didn't consider hiring any. A. We didn't hire any in 1968, that's true.

Q. When were blacks first hired in the company? [1241] A. In 1970.

Q. Where were blacks first hired? A. Out of Birmingham.

The Court: Again we are talking about over-the-road only, I assume.

Mr. Baller: Yes, sir, that's correct.

By Mr. Baller:

Q. Do you remember what month in 1970? A. I believe in September.

Q. And who hired them in Birmingham? A. Joe Woods.

Q. Do you know what the circumstances were at that time for hiring black drivers in Birmingham? A. Yes.

Q. What were they? A. Well, Johnny Lee had filed a complaint, and we pulled his application again and made a more extensive effort to try to establish some road driving experience.

The Court: Was this an EEOC complaint?

The Witness: Right.

By Mr. Baller:

Q. That is Johnny Lee, the Plaintiff, of the intervener in this case? A. Correct. At that time, we got to thinking about the mid-west operation that didn't have bunkrooms in it, so we [1242] decided to then hire as many blacks as we could.

Q. Did you talk to EEOC about this matter? A. I'm sure I did.

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Q. Now, were black drivers hired at that time anywhere else besides Birmingham? A. No, like I told you in the deposition, we had two or three in Richmond operating on lease trucks about 1960 or '61.

Q. Could you explain the nature of a Lease Truck [1243] operation? A. Well, one man had ten, or twelve, or fifteen trucks leased to it, and of course, we qualified the drivers that operated the trucks according to Company regulations and two or three of them happened to be black.

Q. And they weren't driving Bowman Trucks, though. A. They were driving trucks leased to Bowman under Bowman's control.

Q. But who were operated by this other individual.

The Court: Were these trip leases?

The Witness: No, they were permanent leases.

Testimony of Dwight Rice
Testimony of Sam Crisco

By Mr. Baller:

Q. And when did that arrangement end? A. I'm not really sure.

Q. Do you know when a black road driver was first hired out of the Atlanta Terminal? A. Last Fall, I believe.

Q. Do you know what month it was then? A. No.

Q. Do you know when a black road driver was first hired out of the Charlotte Terminal? A. After the first of the year.

Q. The first of this year? A. I believe so.

Q. Have blacks hired out of any other terminal? [1244] A. Richmond.

Q. When was that first done? A. I'm not really sure.

Q. Can you explain what the delay was in hiring black drivers out of the Atlanta Terminal? A. Well, the delay revolved around the same consideration that I have stated before.

Q. What changed last Fall in Atlanta that enabled you to hire black drivers? A. After we had hired several in Birmingham and they began to get runs into this part of the system without too much complaints from the other drivers, then we decided to take a chance here.

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[1249] • • •

Sam Crisco called as a witness by the plaintiff after having first been duly sworn testified as follows:

Cross Examination by Mr. Baller:

Q. Please state your full name and address. A. Sam Crisco, 2611 Williamsburg Drive, Decatur, Georgia.

Testimony of Sam Crisco

Q. And for the record will you state your race, Mr. Crisco? A. White.

Q. By whom are you employed? A. Bowman Transportation, Inc.

Q. And for how long have you worked for Bowman? A. Since 1967.

Q. For whom did you work prior to being employed by Bowman? A. Harper Motor Lines.

[1250] Q. And what was your work at Harper? A. Safety Supervisor.

Q. What was your position at Bowman in 1967 when you were hired? A. Assistant Safety and Personnel Director.

Q. And at what location were you working? A. Atlanta.

Q. What is your position with Bowman now? A. Sales Representative.

Q. Have you held any other jobs with Bowman in the time you have been working there? A. No.

Q. When did you change from Assistant Safety Manager to Sales Representative? A. March of '71.

Q. During the period from 1967 to March of '71, when you were Safety Supervisor, what were your duties? A. Hiring of road drivers and general supervision of road drivers.

Q. Did you hire, for what locations in the Bowman System did you hire road drivers? A. I hired for Atlanta.

Q. Did you have any responsibility for hiring road drivers at other terminals? A. Yes.

[1251] Q. What was your responsibility in that regard? A. I had hired some for the Memphis Terminal, and then I would review applications submitted for employment from other terminals.

Q. By whom were these applications for employment at other terminals submitted? A. Who submitted them?

Q. Right. A. We had Safety Supervisor in Richmond, Virginia, Safety Supervisor in Charlotte, North Carolina, Safety Supervisor in Birmingham, Alabama.

Q. Did those people take applications at those terminals? A. Yes.

Q. And did the men who applied at those other terminals live in that area? A. I suppose.

Q. Did you have a chance to review their applications? A. At times.

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[1371] • • •

A. There is a J. H. Jarnigan hired, date of employment January 30, 1970.

Q. That is about four days after Mr. Lee's application arrived in your office, wasn't it? A. Yes, the first application received, yes.

[1372] The Court: During this time you weren't hiring any blacks out of the Atlanta Terminal, were you?

The Witness: No, sir.

The Court: Wasn't everybody saying they were going to put it off as long as they could?

The Witness: Saying about hiring black drivers?

The Court: Uh, huh.

The Witness: We didn't have the facilities for hiring.

The Court: You mean in bunk beds and showers?

The Witness: Yes, sir.

The Court: All your drivers were telling you every day not to hire anybody and you decided to tough it out as long as you could, isn't that the fact?

The Witness: Yes, sir, we were waiting until we were confronted with it. We had had some to say they would leave themselves.

• • • • •

[1373] *By Mr. Baller:*

Q. Now, if you received an application from a road driver applicant who had no driving experience, could you consider that application? A. If I received it would I consider it for a road drivers application?

Q. Right. [1374] A. No, sir.

Q. Could you hire a man as a trainee if he didn't have any experience? A. If we had a placement for him, we could.

Q. Did you in fact have a training program? A. Yes, sir.

Q. Could you please describe that program? A. Our training program was designed to hire and train drivers for Bowman Transportation. They had to be 25 years of age, have a good work record, motor vehicle record, he had to be neat, conscientious.

• • • • •

Q. You could hire a man as a trainee even if he didn't have truck driving experience? A. Yes, we had a training program.

Q. During what period did you have this program? A. I don't recall the exact dates, it was probably '68 [1375] to maybe up to '71.

Testimony of Sam Crisco

Q. Do you have any idea approximately how many men you hired into the training program? A. One hundred fifty, I suppose, I don't recall, maybe not that many, I maybe off.

Q. But you guess it might be 150? A. It maybe 75, I don't recall, I hired a lot of trainees.

Q. All right. Now, how did this trainee program work, first in terms of application to the program? A. The application checked out, then if we had a driver who would take the man and train him then later we had to alter our training program, so a driver-trainer had to agree to take him before we could check the application out in most cases.

Q. Who would this driver-trainer be? A. A regular employed road driver with a good record.

Q. Of Bowman that is. A. Right, that had been there for at least six months or longer.

Q. I see. Now, would these regularly employed drivers refer other people for that program? A. Some, some did.

Q. If a man came in and he didn't have a sponsor who was already a driver, would you hire him as a trainee? A. In the beginning we did, if he checked out.

Q. And after the beginning, what happened? [1376] A. Well, the road drivers did not want to take a man and train him and if we asked him to and it didn't work out with the driver-trainee, then we would soon lose the trainee, so at a later time we let the driver-trainee decide whether or not he wanted to train him.

Q. And if he did you would hire him? A. If he checked out, yes.

• • • • •

[1379] • • •

Q. How many black applicants did you have during the time you were hiring road drivers? A. From 1967?

Testimony of Sam Crisco

Q. Right. A. Not too many.

Q. Did you have as many as one a week? A. It's possible it would be one a week, it could have been less.

Q. And you never hired a black applicant, is that right? A. No, sir.

Q. Tell us why you didn't hire any.

The Court: He has already told you I think.

The Witness: We didn't have the provisions for hiring of the black drivers under our present program, training [1380] program. All applicants hired had to ride with a driver for at least 90 days to six months.

The Court: Was there ever a black driver hired out there until Mr. Pate said somebody better get busy and hire somebody?

The Witness: I don't think we had hired a road driver until—

By Mr. Baller:

Q. Was that the reason you didn't hire any black road drivers? A. No, sir, I don't recall receiving one that was qualified.

Q. I see. Is your reason that you didn't have any applications from qualified black drivers? A. I don't follow you.

Q. Did you have any qualified black applicants? A. No, sir, I don't recall one.

Q. All right. How many applications did you have from white drivers per month? A. Probably 100, could be more or less.

Testimony of Sam Crisco
Further Testimony of Dwight Rice

Q. And how many of those did you hire? A. Maybe 15 to 20 percent.

Q. All right. Now, were all of those people qualified? A. The 15 or 20 percent were, yes, sir, except for the trainees that we hired during that time; but they were qualified [1381] trainee applicants.

Q. So all the white drivers that you hired were more qualified than all the black applicants, is that what you are stating? A. I did not receive one that had qualified.

Q. Okay. A. I'm sure there could have been some trainees, but we didn't have any driver-trainer.

• • • • •

[1680] • • •

B. C. Rice, having testified, recalled for continued:

Direct Examination by Mr. Pate:

Q. You are Mr. B. C. Rice? A. Yes, sir.

Q. I believe you identified yourself before? A. That is correct.

Q. And hiring of road drivers is generally under your supervision; is that right? A. That's correct.

Q. Now, will you tell us what qualifications an applicant has to meet to be hired as a road driver? A. He has to be age twenty-five.

Q. Age twenty-five? A. That is company regulation.

Q. Yes. A. He has to be able to pass a DOT physical. He [1681] cannot have a history of a back injury or operation. We don't hire if he presently has a hernia. We basically look for one or more years tractor-trailer driving, over-the-road experience, we expect a good or clean motor

Further Testimony of Dwight Rice

vehicle driving record which applies to his driver's license. We do not hire if he has had a driving under the influence within the previous five years. We are primarily looking for stable employees who are not job-jumpers. We prefer that the man live within two hours of the terminal he is domiciled to run out of.

• • • • •

[1684] • • •

Q. Tractor-trailer, over-the-road experience for a year; is that required in all cases for road drivers? A. It is not absolute. That is what we are looking for, one or more years of tractor-trailer, over-the-road experience. I think we have previously testified that we do take trainees where one of our present experienced road drivers will agree to take the man on and teach him the operation and how to drive.

Q. So, other than trainees, do you require the year in all instances? A. Well, not entirely. If he has had, I'd say, six months tractor-trailer experience, we feel that we would have a better chance of putting him with an older driver and getting the older driver's acceptance as far as taking him [1685] and further training him.

Q. If he does not come as a trainee, does he work with an older driver still, or not? A. Regardless of the years of experience he has had, he is put with an older driver for some period of time until we can get an evaluation of his ability and his ability to do the paper work we would—

Q. All right. How does he differ from the trainee, then?

A. Well, the trainee, basically, could have either no tractor-trailer experience. Of course, this would disqualify him from passing his road test, but he could have enough yard experience or city experience with an independent

company and that nature that would enable him to pass a road test. Of course, we also consider people that have graduated from the driver training schools that are commercial schools, as well as state supported schools due to the shortage of training they have had as far as operating the vehicle is concerned. We would consider them a trainee and again wouldn't employ them unless one of the older drivers agreed to give him further training.

Q. Well, after they get on the job, what is the difference in the way they operate? A. Basically, there is no difference. It's a double operation.

• • • • •

[1774] • • •

JOSEPH D. WOODS called as a witness by the defendant after having first been duly sworn testified as follows:

Direct Examination by Mr. Pate:

Q. Give us your name. A. Joseph D. Woods.

Q. Where do you live, Mr. Woods? A. Birmingham, Alabama.

Q. Where are you employed? A. Bowmans Transportation.

Q. How long have you been connected with Bowmans? A. Since January of 1969.

Q. What is your present position? A. Safety Supervisor.

Q. Is that the same one you have had all the time? A. Yes, sir.

Q. Where are you located? A. Birmingham.

Q. Do you have something to do with the hiring of road drivers? [1775] A. Yes, I do.

Q. And what do you have to do with that? A. Well, I accept the applications and check the applications out through my office and make the decision whether to hire the man or reject him.

Q. And for what part of the operation is that? A. That's for the Birmingham Terminal, the Western part of our operation.

• • • • •

[1790] • • •

Cross Examination by Mrs. Rindskopf:

Q. Mr. Woods, let me review some of your testimony. How long have you been the person chiefly in charge of hiring road drivers in Birmingham? A. Since January of '69.

Q. Since January of '69. And during that time you have been the person primarily responsible for hiring road drivers and firing them as well? A. Yes, ma'am.

Q. Do you have charge also of reviewing their performance on the job? A. Yes, ma'am.

Q. That is in your authority as well? A. Yes, ma'am.

Q. Approximately how many drivers do you hire a year, [1791] of course we are referring to your experience of '69, '70 and '71? A. I haven't made any studies in that, I couldn't give you even a close estimate.

Q. At the present time you have 115 drivers employed? A. Yes, ma'am.

Q. Would you say that your turnover is approximately 50% a year? A. I'd say it would be close.

Q. So we will estimate that you hire anywhere from 50 drivers up a year, would that be right? A. Yes, ma'am.

Testimony of Joe Woods
Testimony of Herman Adkins

Q. Okay, now, I gather from your testimony as well that it is not an easy job to keep your drivers up to a full compliment, is that right? A. No, ma'am it's not.

Q. On occasion, as a matter of fact, you have to dip into a group of people that are not as qualified as you like, who have perhaps less than a year's drivers experience, is that right? A. Our policy has been all the time to hire trainees.

Q. And that is because you simpy can't find sufficient qualified people, is that right? A. Yes, ma'am.

Q. Now, I believe you also stated that at the present [1792] time you have 14 black drivers? A. I think that is correct.

Q. Okay. When was the first black driver hired? A. It was either August or September of 1970.

Q. Do you remember the exact date? A. No, ma'am, I don't.

Q. Would you agree that it was—

The Court: September 11, '70.

By Mrs. Rindskopf:

Q. September 11, '70.

• • • • •

[1859] • • •

Herman Adkins called as a witness by the defendant Union after having first been duly sworn testified as follows:

Direct Examination by Mr. Hocutt:

Q. For the record, would you state your full name, please, sir? A. Herman Bruce Adkins.

Testimony of Herman Adkins

Q. Where do you live Mr. Adkins? A. 6022 Woodview Drive, Morrow, Georgia.

Q. How old are you? A. 53.

Q. What is your occupation, Mr. Adkins? [1860] A. Labor Representative.

Q. Did you have a position with the International Union of District 50, defendant in this case? A. I do.

Q. What is that position, please sir? A. I have a dual position, I am International Executive Board Member, and I am also Regional Director of Region 26 in Atlanta, Georgia.

• • • • •

[1862] Q. I won't bother to go into that at this time. Mr. Adkins from 1960 to 1967 did the International or Local represent Bowman employees in any way? A. No, sir. We had an election, we didn't represent them by contract, but we was authorized to petition the National Labor Relations Board in 1963. We petitioned and lost an election. We had a continuous campaign from that time until we did get enough members to agree with us and prevailed on the company to recognize us through a certification by the County Ordinary of Clayton County, Georgia.

Q. All right, sir, then in 1967 you were successful in organizing the company, is that right? A. Yes.

Q. And you are recognized by Bowman as the bargaining agent for the Bowman employees? A. Yes, sir.

• • • • •

[1864] • • •

Q. All right, sir. Now, when did Bowman and the union begin negotiations leading to the 1967 Collective Bargaining Agreement? A. I believe it was in July. We reached an agreement on July 29, 1967.

• • • • •

Testimony of Herman Adkins

[1865] • • •

Q. I understand. Mr. Adkins, with respect to the interdepartmental transfer and seniority, I'd like for you to tell the Court the Union's position on that and what did it bargain for? A. Well, it has long been the policy of our Union that company wide seniority is the only true seniority there is; and if you take away from it you have taken away from the oldest person. We proposed company wide seniority. During the negotiations we modified our demands on several occasions and wound up with what finally was in the contract.

Q. All right, sir, and that was not company wide seniority? A. No, it was not.

Q. Now, could you explain to the Court why the Union acceded to a departmental seniority which eventually was recorded in the contract? A. Well, at the time we negotiated our contract, first and also the last, and what we term strength, we did not have strength to strike this company and force the type of seniority or other conditions that we really wanted. This company had been through a strike of three or four or five years and it had a lot of labor trouble and the people that we represented were very skeptical of using our economic strength, so we [1866] bargained and bargained hard, got what we could and we polled the membership of the committee, which at that time was 26 or 27, to see if we could strike the system and be effective and force a better arrangement.

We only had two terminals as I remember and I'd rather not call those, that said they could strike. The rest of the 24 terminals at that time said no.

• • • • •

Testimony of Herman Adkins

[1867] • • •

Q. All right. Now, would you state whether or not the question of interdepartmental transfer and seniority was in fact included in the reopened negotiations in 1968? A. It was.

Q. What did you bargain for at that time? A. Well, we wanted broader seniority, namely we were interested in seniority being system wide; but we bargained for anything that we could get better than what we had, close to that company wide seniority.

Q. All right, sir. Do you recall whether you made any progress along these lines or not? A. We only made progress in the area of posting bids which relates to seniority, and that was that the time of the working hours would be posted along with the bids.

Q. But again you were not successful in obtaining interdepartmental transfer? A. That's true and this reopener, by the way, was without the right to strike.

• • • • •

[1873] • • •

Q. With respect to that particular point, Mr. Adkins, based on your knowledge of union membership, can you state whether a majority of union are in favor of, or opposed to company wide seniority? A. We would take at this operation today, I would say the membership would ratify two-to-one company seniority.

Q. All right, sir, one final question. Does the union have anything to do whatsoever with the hiring process? A. None.

• • • • •

Plaintiffs' Exhibit 1

[557] [Partial]

AGREEMENT

This Agreement made and entered into by and between Bowman Transportation, Incorporated (herein called the Company), and International Union of District 50, United Mine Workers of America (herein called the Union), on behalf of its Local Union 13600, this 29th day of July, 1967.

• • • • •

[558] • • •

ARTICLE IV

Seniority

1. Seniority shall be departmental in nature, and each employee's seniority shall be based upon his length of service in his department.

2. For the purpose of this article the departments shall be as follows:

(1) Over-the-road drivers.

(2) City pick-up and delivery drivers and dock workers, such employees at each terminal to constitute a separate department.

(3) Atlanta shop employees.

(4) Gadsden shop employees.

3. A new employee, while working under the terms and conditions of this Agreement, shall have no seniority status for the first forty-five (45) days of employment, and if [559] his services are terminated during this probationary period he will have no recourse to the grievance procedure. However, if he is retained for more than forty-five (45) days, his seniority shall run from his date of hire.

4. An employee shall lose his seniority upon the termination of his employment.

Plaintiffs' Exhibit 1

5. In the lay-off and recall of employees, the governing factor will be seniority subject to the qualifications and ability of an employee to do the available work.

6. In the assignment of dock workers to shifts, the Company shall consider seniority along with the needs of the business and the relative experience and ability of employees.

7. Job vacancies will be posted for a period of three work days for bidding by employees of the department in which the vacancy exists. Vacancies on regular runs of over-the-road drivers will be posted for two weeks. The Company will award the job or run to the bidding employee with the greatest seniority who is qualified for the job. The Company will furnish the Union a copy of the posted notice calling for bids. If the Company determines that none of the applicants have the necessary qualifications for the job, it may assign another employee to fill the vacancy or hire a new employee to fill it.

8. The Company shall post and maintain at each terminal and shop, a seniority list of employees in the unit at such terminal or shop. The seniority list for over-the-road drivers shall be posted and maintained in the Atlanta terminal.

• • • • •

ARTICLE VI

Vacations

1. Employees will receive vacations with pay, based upon their years of continuous service with the company as follows:

Years of Service	*Weeks of Vacation*
1	1
3	2
10	3

Plaintiffs' Exhibit 1

[570] [Partial]

AGREEMENT

THIS AGREEMENT made and entered into by and between BOWMAN TRANSPORTATION, INC. (herein called the Company), and INTERNATIONAL UNION OF DISTRICT 50, ALLIED & TECHNICAL WORKERS OF THE UNITED STATES & CANADA (herein called the Union), on behalf of its Local Union 13600, this 6th day of August, 1970.

• • • • •

[571] • • •

ARTICLE IV

Seniority

1. Seniority shall be departmental in nature, and each employee's seniority shall be based upon his length of service in his department.

2. For the purposes of this article the departments shall be as follows:

(1) Over-the-road drivers.

(2) City pickup and delivery drivers and dock workers.

(3) Shop employees.

Employees in departmental categories (2) and (3) shall constitute a separate department at each terminal.

[572] 3. A new employee shall have no seniority status for the first forty-five (45) calendar days of employment, and if his employment is terminated during this probationary period he will have no recourse to the grievance pro-

Plaintiffs' Exhibit 1

cedure. If he is retained for more than 45 calendar days, his seniority shall run from his date of hire.

4. An employee shall lose his seniority upon the termination of his employment. If an employee moves from a job within the unit covered by this Agreement to a job with the Company outside this unit, he shall not accumulate seniority during his employment outside the unit. For a period of ninety (90) calendar days after such employee's promotion or transfer to a job outside the unit, he shall retain his seniority and may elect to return, or the Company in its discretion may return him, to his former job within the unit. If the employee continues in employment outside the unit for a period in excess of 90 calendar days, he shall lose his seniority.

5. In the layoff and recall of employees, the governing factor will be seniority subject to the qualifications and ability of an employee to do the available work.

6. In the assignment of dock workers to shifts, the Company shall consider seniority along with the needs of the business and the relative experience and ability of employees. When a vacancy for a city driver, dock worker, or shop worker's job is posted for bidding in accordance with Section 7 of this article, the posted notice will show the hours of shift in addition to the job for which bids are requested.

7. Job vacancies will be posted for a period of three work days for bidding by employees of the department in which the vacancy exists. Vacancies on regular runs of over-the-road drivers will be posted for two weeks in Atlanta, Charlotte and Gadsden. The Company will award the job or run to the bidding employee with the greatest

Plaintiffs' Exhibit 1

seniority who is qualified for the job. The Company will furnish the Union a copy of the posted notice calling for bids. If there are no eligible applicants, or if the Company determines that none of the applicants have the necessary qualifications for the job, it may assign another employee to fill the vacancy or hire a new employee to fill it.

8. The Company shall post and maintain at each terminal and shop, a seniority list of employees in the unit at such terminal or shop. The seniority list for over-the-road drivers shall be posted and maintained in the Atlanta, Charlotte and Gadsden terminals.

[573] 9. All regular runs shall be posted for bidding on or before June 1 of each year. Any regular run filled by a new employee in accordance with Section 7 of this article, will not be included in any such annual posting occurring within six months after the job is so filled, but will be included in the second annual posting of regular runs occurring after the run is thus filled by a new employee. Vacancies in regular runs shall be posted for bidding when they occur.

10. All city drivers', dock workers', and shop workers' jobs will be posted in accordance with Sections 6 and 7 of this article within 30 days after the effective date of this Agreement, and shall be posted thereafter at intervals of approximately one year.

• • • • •

Plaintiffs' Exhibit 1

ARTICLE VI

Vacations

1. Employees will receive vacations with pay, based upon their years of continuous service with the company as follows: [574]

Years of Service	*Weeks of Vacation*
1	1
3	2
10	3

Plaintiffs' Exhibit 2

[Partial]

(See Opposite) ☞

TABLE IV A

Over-The-Road Driver Annual Hiring

(All Terminals)

1965		1966		1967		1968		1969		1970		1971	
Blacks	Whites	Blacks	Whites	Blacks	Whites	Blacks	Whites	Blacks	Whites	Blacks	Whites	Blacks	Whites
0	31	0	48	0	33	0	74	0	138	10*	149	13*	88

Source: With the exception of the figures for Blacks in 1970 and 1971, these figures were culled from Company Seniority lists dated July 20, 1970 and May 1, 1971. Thus, only those employees still employed on the seniority list's preparation date are included.

* The Figures for Black hirees in 1970 and 1971 are derived from Answers to Plaintiff's Third Interrogatories, Answer #1 (Appendix)

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TABLE V A

Black Over-The-Road Driver Applications
(by Terminal)

	1970		1971		1972		TOTAL		
	Hired	Not Hired	Hired	Not Hired	Hired	Not Hired	Applications	Hired	Not Hired
Atlanta	0	25	2	99	2	6	134	4	130
Birmingham	10	26	8	51	0	4	99	18	81
Charlotte	0	1	0	3	1	0	5	1	4
Richmond	0	0	3	1	1	0	5	4	1
TOTAL*	10	52	13	154	4	10	143	27	216

* In addition to the Totals shown, there were five (5) Black applicants rejected by the Atlanta Terminal for which no application date was shown, and five Black applicants who were asked to report, but did not do so. Fifteen (15) additional Black applicants were awaiting disposition? (Atlanta: 4; Birmingham: 8; Charlotte: 3).

Source: Answers to Plaintiff's Third Interrogatories, Answer #1 (Appendix)

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TABLE V B

Black Over-the-Road Driver Applications
(By Terminal and Experience)

Date of Application:	1970						1971					
Disposition:	Hire			Not Hire			Hire			Not Hire		
Experience:	claim ≤ 1yr.	claim ≥ 1yr. (not verified)	verify ≥ 1 yr.	claim ≤ 1yr.	claim ≥ 1yr. (not verified)	verify ≥ 1 yr.	claim ≤ 1yr.	claim ≥ 1yr. (not verified)	verify ≥ 1 yr.	claim ≤ 1yr.	claim ≥ 1yr. (not verified)	verify ≥ 1 yr.
Atlanta	0	0	0	11	9	5	0	0	2	42	43	14
Birmingham	2	0	8	7	9	10	2	0	6	18	22	11
Charlotte	0	0	0	1	0	0	0	0	0	0	3	0
Richmond	0	0	0	0	0	0	0	0	3	0	1	0

Source: Answers to Plaintiff's Third Interrogatories, Answer #1, Apperdix; See Table V A supra.

[CONTINUED ON FOLLOWING PAGE]

TABLE V B (continued)

Black Over-the-Road Driver Applications
(by Terminal and Experience)

Date of Application:	1972					
	HIRE			NOT HIRE		
Disposition:	claim	claim	verify	claim	claim	verify
Experience:	≤1 yr.	>1 yr. (not verified)	≥1 yr.	≤1 yr.	>1 yr. (not verified)	≥1 yr.
Terminal						
Atlanta	0	0	2	5	1	0
Birmingham	0	0	0	3	1	0
Charlotte	0	0	1	0	0	0
Richmond	0	0	1	0	0	0

Source: Answers to Plaintiff's Third Interrogatories, Answer # 1, Appendix. See Table V A supra.

Supreme Court, U. S.
FILED
FEB 21 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-728

HAROLD FRANKS and JOHNNIE LEE,
Petitioners,

vs.

BOWMAN TRANSPORTATION, INC., and INTERNATIONAL UNION OF DISTRICT 50, ALLIED AND TECHNICAL WORKERS OF THE UNITED STATES AND CANADA, AND ITS LOCAL NO. 13600,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT BOWMAN TRANSPORTATION, INC., IN OPPOSITION TO CERTIORARI

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-728

HAROLD FRANKS and JOHNNIE LEE,
Petitioners,

vs.

BOWMAN TRANSPORTATION, INC., and INTERNATIONAL UNION OF DISTRICT 50, ALLIED AND TECHNICAL WORKERS OF THE UNITED STATES AND CANADA, AND ITS LOCAL NO. 13600,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT BOWMAN TRANSPORTATION, INC., IN OPPOSITION TO CERTIORARI

QUESTIONS PRESENTED

The question as stated by petitioners, under the present facts, requires the additional question whether the Court of Appeals correctly held that the District Court did not abuse its discretion in refusing to grant seniority from the date of their rejection, to black applicants denied employment as road drivers.

STATEMENT OF THE CASE

Petitioners' statement of the case is substantially correct. However, this respondent does not agree entirely with the statements concerning the holdings of the courts below.

In denying retroactive seniority to rejected applicants, the District Court stated the same reasons which were given for its denial of class back pay. It deemed that such relief was not warranted in class actions, and it would bypass the statutory administrative prerequisites to personal suit and thus thwart the Act's emphasis on conciliation and private settlement. Also, the court stated that it was denying this remedy, along with class back pay, in the exercise of its discretion (A53-A54).

The Court of Appeals reversed the holding that either Rule 23(b)(2) or Title VII prohibits back-pay awards to unnamed class members. Since it appeared that the District Court had exercised its discretion under a view of the applicable law which the appellate court deemed erroneous, the latter court vacated the portion of the decree denying back pay to the class, and remanded for reconsideration of this issue (A37-A40). The court did not decide that class members were entitled to back pay.

The Court of Appeals refused to grant application-date seniority to class members who were denied employment. The court stated the view that this extension of such constructive seniority as a remedy was not permitted under section 703(h) of Title VII[1] (A30). This view was not relied upon by the District Court. Despite its statement of this view, the holding of the Court of Appeals was that the District Court "did not abuse its discretion in

1. 42 U.S.C. §2000e-2(h).

refusing to create constructive seniority for black OTR applicants who were rejected as a result of Bowman's discriminatory policy" (A31).

ARGUMENT

It is conceded that the view of the Fifth Circuit may be incorrect concerning the effect of section 703(h) upon the seniority remedy sought by petitioners. The Sixth Circuit has expressly disagreed with that view in *Meadows* v. *Ford Motor Co.*, ... F.2d ..... (1975), holding that the grant or denial of retroactive seniority to rejected applicants was a matter within the discretion of the trial court.

The difference between the circuits thus relates to the effect of section 703(h) as an obstacle to the remedy in question. The two views lead to the same conclusion on the present facts. The Fifth Circuit held that the District Court did not abuse its discretion in denying the requested remedy. Since the Sixth Circuit held the remedy to be discretionary with the trial court, the principle of *Meadows* leads to the same result. The difference between circuits on the effect of section 703(h) becomes academic in relation to present facts.

The view of this respondent concerning the applicable legal principle is in substantial accord with that stated in the last paragraph of the memorandum filed for the United States and the EEOC:

> The issue here is a narrow one. It is not whether full seniority credit for all purposes must be granted to all members of the affected class who are ultimately hired by the company; it is whether some form of seniority credit *may* be granted in appropriate circumstances to eliminate the effects of past hiring

discrimination. The resolution of the issue will not require this Court to determine the precise form that such relief should take in this case. As the Sixth Circuit recognized in *Meadows, supra,* that task, which requires a careful consideration of all the competing interests at stake, properly "lies in the first instance with the District Judge" (slip op. at 19).

Like the government, this respondent does not argue that retroactive seniority may not be granted as a remedy for applicants wrongfully rejected. Respondent states that the matter is within the discretion of the district judge, who has the task of considering the competing interests at stake. The district judge exercised his discretion in the present case, and the Court of Appeals found no abuse of discretion. Those rulings should conclude the issue under the view of the applicable law taken by any of the parties.

The issue thus reduces itself to a question of possible abuse of discretion by the District Court. Where that exercise of discretion has been sustained on appeal, the question is hardly substantial enough to warrant this Court's review. The court's discretion to withhold a particular remedy, entirely consistent with *Meadows*, supra, has been frequently sustained in cases under Title VII.[2]

2. In *Thornton* v. *East Texas Motor Freight, Inc.*, 497 F.2d 416 (6th Cir. 1974), the court sustained the discretion of the district court to withhold seniority relief from some discriminatees, and held that the award of back pay rested within the sound discretion of the trial judge. Back pay was denied in the following cases: *U. S.* v. *St. Louis-San Francisco Railway Co.*, 464 F.2d 301 (8th Cir. 1972), cert. den'd 409 U.S. 1116 (1973); *U. S.* v. *N. L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973); *Manning* v. *Int'l Union*, 466 F.2d 812 (6th Cir. 1972), cert. den'd 410 U.S. 946 (1973); *United Steelworkers of America, Local 1104* v. *U. S. Steel Corp.*, 478 F.2d 1255 (6th Cir. 1973); *LeBlanc* v. *So. Bell. Tel. & Tel. Co.*, 333 F.Supp. 602 (D.C. La. 1971), aff'd per curiam 460 F.2d 1228 (5th Cir. 1972), cert. den'd 409 U.S. 990 (1972); *Kober* v. *Westinghouse Elec. Corp.*, 480 F.2d 240 (3d Cir. 1973); *Rosenfeld* v. *So. Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971).

Petitioners do not assert a conflict among circuits on the issue involved here. The cases cited by petitioners (petition, pp. 16-17), arising under the National Labor Relations Act, do not deal with the question. Although the courts have enforced orders of the NLRB requiring reinstatement of rejected applicants with seniority, or "without prejudice to seniority", the courts did not rule upon the seniority remedy or upon the Board's discretionary power to grant or deny it. See *Atlantic Maintenance Co.* v. *N.L.R.B.*, 305 F.2d 604 (3d Cir. 1962); *N.L.R.B.* v. *Lamar Creamery Co.*, 246 F.2d 3 (5th Cir. 1957); *N.L.R.B.* v. *Cone Bros. Contracting Co.*, 317 F.2d 3 (5th Cir. 1963). In *N.L.R.B.* v. *Phelps Dodge Corp.*, 313 U.S. 177, 195-198 (1941), this Court, in sustaining the Board's order directing the employment of rejected applicants with back pay, acknowledged that these remedies were discretionary with the Board. The Court's statement on the latter remedy (313 U.S. at 198) is equally applicable to the seniority remedy here: "The remedy of back pay . . . is entrusted to the Board's discretion; it is not mechanically compelled by the Act. And in applying its authority over back pay orders, the Board has not used stereotyped formulas but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations."

In *N.L.R.B.* v. *Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969), this Court reversed the Court of Appeals' modification of an NLRB back-pay order. The appellate court had eliminated back pay after a certain date because of the Board's "inordinate" delay. This Court held that the Court of Appeals exceeded the narrow scope of review provided for the Board's remedial orders. Again, the emphasis is upon the discretion of the Board, whose position is somewhat analogous to that of the District Court. In

none of the other cited cases did this Court make a ruling which touches upon the present issue.[3]

If this case is deemed to present an issue of the availability of the seniority remedy under applicable law, apart from the district judge's discretion to deny the remedy, it is this respondent's position that the remedy is not appropriate, not because of section 703(h), but substantially for the reasons given by the District Court. In this regard the case presents generally the same questions which are raised by this respondent in its petition for certiorari in No. 74-424 directed to the rulings below concerning the award of back pay to unnamed class members. Respondent submits that the seniority remedy, like class back pay, is not appropriate in a Rule 23(b)(2) class action, particularly where notice has not been given to identifiable class members. See *Eisen* v. *Carlisle & Jacquelin,* 40 L.Ed. 2d 732 (1974). Furthermore, the remedy is not available to class members with respect to whom a charge has not been filed under Title VII with the EEOC. A contrary holding has the effect, as the District Court noted, of bypassing the statutory administrative prerequisites to personal suit and the emphasis on conciliation and private settlement.

---

3. *Golden State Bottling Co.* v. *N.L.R.B.*, 38 L.Ed. 2d 388 (1973), dealt with the liability of a successor employer who acquired the business after issuance of the Board's reinstatement and back-pay order. *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), dealt with questions of reinstatement of economic strikers, but not with the present question of remedy. *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953), sustained the validity of a contractual provision giving preemployment seniority credit for military service. The questions in *Southport Petroleum Co.* v. *N.L.R.B.*, 315 U.S. 100 (1942), and *Aeronautical Industrial District Lodge* v. *Campbell*, 337 U.S. 521 (1949), are even more remote to present issues.

The question presented here is closely related to the questions raised in No. 74-424. That petition for certiorari has been denied, but this respondent is presenting a motion for leave to file a petition for rehearing. Although the present question, standing alone, appears not to be of sufficient importance to warrant review by this Court, it is appropriate for review in conjunction with the questions presented in No. 424. If that petition for certiorari is granted, this respondent does not oppose the granting of the instant petition.

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IN THE

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October Term, 1974

No. 74-728

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v.

BOWMAN TRANSPORTATION COMPANY, INC., ET AL

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

UNION'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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United Steelworkers of America, AFL-CIO (hereinafter "USWA" or "the Union"), the union-respondent in this case,[1] agrees with petitioners that certiorari should be granted.

---

[1] USWA was not the employees' bargaining representative at the time of the events giving rise to this lawsuit, and it is not the union named in the caption. However, the named union-respondent, International Union of District 50, Allied and Technical Workers, merged with USWA in 1972. See, *Brennan* v. *International Union of District 50,* 499 F.2d 1051, 1055 (D.C. Cir., 1974). Accordingly, USWA is now the bargaining representative; and as District 50 no longer has an independent existence, USWA perforce is now the union-respondent herein.

I. CONFLICT AMONG THE CIRCUITS

There is a three-way split among the circuits on the question whether retroactive seniority may be awarded to job applicants who were discriminatorily denied employment after the effective date of Title VII. The Fifth Circuit, in the instant case, held that as a matter of law such relief may not be awarded. The Third Circuit, on the other hand, has held that such relief is *required*. *Jurinko* v. *Edwin L. Weigand Co.*, 477 F.2d 1038, 1046-47 (3rd Cir., 1973), vacated on other grounds, 414 U.S. 971 (1973). The Sixth Circuit, in a decision issued after the decision below, has held that such relief is not precluded as a matter of law, but that the question whether it should be granted is one committed to the equitable discretion of the district court, which must weigh the competing interests militating in favor of and against such relief and consider whether there are other remedial devices which would better accommodate those competing interests. *Meadows* v. *Ford Motor Co.*, 9 FEP Cases 180 (6th Cir., 1975).

In *Meadows*, the Sixth Circuit explained the need for balancing as follows (*Id.* at 188):

> Seniority is a system of job security calling for reduction of work forces in periods of low production by layoff first of those employees with the most recent dates of hire. It is justified among workers by the concept that the older workers in point of service have earned their retention of jobs by the length of prior service for the particular employer. From the employer's point of view, it is justified by the fact that it means retention of the most experienced and presumably most skilled of the work force. Obviously, the grant of fully retroactive seniority would collide with both of these principles.
>
> In addition, where the burden of retroactive pay falls upon the party which violated the law, the burden of retroactive seniority for determination of layoff would fall directly upon other workers who have themselves had no hand in the wrongdoing found by the District Court.

Based upon these considerations, the Sixth Circuit observed that a grant of retroactive seniority should "not depend solely upon the existence of a record sufficient to justify back pay," i.e., proof that the plaintiff was discriminatorily rejected for employment earlier. Rather, the district court "would, in dealing with job seniority, need also to consider the interests of the workers who might be displaced as well as the interests of the employer in retaining an experienced workforce." The Court thought that reconciling these competing considerations was not "impossible", although it foresaw "genuine difficulties."

II. CLARIFYING THE ISSUE PRESENTED

While we agree that certiorari is warranted, we feel obliged to comment upon certain doctrinal confusions engendered by petitioners' efforts to exaggerate the importance of this case. Petitioners seek to equate the issue herein with one which is quite different, and which has generated its own volume of recent litigation: whether newly-hired minority employees, *who were not themselves discriminated against by their employer,* are entitled to preferred seniority rights over more senior whites because in the past *(usually before the effective date of Title VII)* the employer had pursued a discriminatory hiring policy. The courts have generally concluded (correctly, in our view) that the policies of the Act preclude awarding artificial seniority in this situation. *Local 189, United Papermakers* v. *United States,* 416 F.2d 980, 994-995 (5th Cir., 1969), cert. denied, 397 U.S. 919 (1970); *Waters* v. *Wisconsin Steel Works,* 502 F.2d 1309 (7th Cir., 1974); *Jersey Central Power & Light Co.* v. *Local Unions 327, etc., Electrical Workers,* 9 FEP

Cases 117 (3rd Cir., 1975).[2] These holdings have been premised upon (1) the legislative history indicating that Congress did not intend to interfere with employment seniority rights accumulated prior to the effective date of Title VII,[3] and (2) the legislative decision embodied in Section 703(j), 42 U.S.C. §2000e-2(j) (which may also be a constitional imperative[4]) that Title VII is not to be construed to award preferential treatment to minority employees who were not themselves victims of employment discrimination, simply because the employer in the past discriminated against *other* minority employees and thereby created an "imbalance" (i.e., a disproportionately small percentage of minority employees) in its workforce.

The issue posed in the instant case is quite different, for here the employer engaged in hiring discrimination after the effective date of Title VII, and the plaintiffs are the very victims of that post-Act discrimination. Given the conjunction of these two critical facts, i.e., that the discrimination occurred after the Act became effective, and that seniority relief is sought only for the identifiable victims of that discrimination, neither of the legislative barriers to affording relief recognized in those cases is applicable here.

III. IS THE DECISION BELOW INCORRECT?

We have real doubts as to the correctness of the decision below. Petitioners were discriminated against after the effective date of the Act, and it seems apparent that they should be awarded a remedy which makes them whole. The decision below does not accomplish this. It provides

[2] Contra: *Watkins* v. *United Steelworkers,* 369 F. Supp. 1221 (E.D. La., 1973), pending on appeal to Fifth Circuit as No. 74-2604, argued January 20, 1975.

[3] This legislative history is described in *Local 189, supra,* 416 F.2d at 987, and n.8 thereat.

[4] See, e.g., the issues presented but not resolved in *DeFunis* v. *Odegaard,* 416 U.S. 312 (1974).

back pay for the period during which employment was denied altogether, but it remits petitioners, without compensation, to an employment future in which their inferior seniority status ("inferior", that is, to the one which they would enjoy had they been hired initially without discrimination) is likely to visit a continuing financial injury (as they fail to obtain promotions, or to hold work during layoffs, which an earlier seniority date would secure for them).

Theoretically, there are two ways in which petitioners could be made whole: (1) they could be awarded the seniority date which they would have received but for the discrimination, or (2) they could be awarded "front pay" which would compensate them for the fact that because they do *not* have the earlier seniority date they may be affected adversely in the future.[5]

The court below thought the first of these remedies precluded by the "bona fide seniority" exception to Title VII, Section 703(h), 29 U.S.C. §2000e-2(h). Whether it was right depends upon a careful assessment of the legislative history of that provision and of the judicial developments to date—matters which we are prepared to discuss fully if certiorari is granted. But assuming the court below *was* right, there is no legislative barrier to the alternative remedy of front pay, and the failure to provide it is not explained in the opinion below. (In fairness to the court below, it should be noted that none of the parties briefed below the issue which this Court is asked to review by certiorari, for it constituted a very minor item in a suit replete with issues of greater practical importance to the parties. The court below announced its holding on this issue without the benefit of the parties' views. Although petitioners thereafter sought

[5] "Front pay" might take either of two forms: a lump-sum payment at the time of judgment (necessarily an estimate), or a judicial direction that if and when future injury occurs compensation will be provided at that time.

rehearing of this holding, the court denied the petition without requesting an answer from appellees, and thus it never had the views of the union and the employer.[6] Ironically, the Sixth Circuit's contrary decision in *Meadows* likewise was rendered without the benefit of briefs from the parties on this issue.)

If, on the other hand, the court below was *wrong* on the 703(h) issue, there still remains the question—upon which the Third and Sixth Circuits are in conflict, *supra* pp. 2-3—whether retroactive seniority should be automatically provided, or whether instead the district court should have discretion to choose between retroactive seniority or front pay depending upon the circumstances of the case.

Finally, the court below apparently did not realize, as the Sixth Circuit did in *Meadows,* that length of service customarily serves a dual function. In addition to serving as a measure of competition between employees, it is also used as the measure for determining an employee's entitlement to fringe benefits (e.g., entitlement to pensions normally depends upon the accumulation of a specified number of years of service). There is no statutory policy which even arguably precludes retroactive investment of length of service for fringe benefit computation purposes. See *Meadows,* 9 FEP Cases at 188.

[6] Rule 40(a), FRAP, provides that "no answer to a petition for rehearing will be received unless requested by the court. . . ."

CONCLUSION

USWA agrees that the Petition for Certiorari should be granted. In view of the distinct possibility that the three parties to this litigation will take three different positions on the merits, USWA suggests that this case not be placed on the summary calendar.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-728

HAROLD FRANKS and JOHNNIE LEE,

Petitioners,

v.

BOWMAN TRANSPORTATION COMPANY, INC., et al.,

Respondents.

BRIEF FOR PETITIONERS

Opinions Below

The opinion of the United States Court of Appeals for the Fifth Circuit denying the relief here sought is reported at 495 F.2d 398 (Pet. A1-A41).[1] The order of the Court of Appeals denying rehearing is reported at 500 F.2d 1184 (Pet. A44). The opinion, order and decree, and judgment of the district court, which are not officially reported, appear at 5 EPD ¶ 8497 (Pet. A45-A70).

Jurisdiction

The jurisdiction of this Court rests on 28 U.S.C. § 1254(1). The judgment of the United States Court of Appeals for the Fifth Circuit was entered June 3, 1974

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[1] References in this form are to the Appendix to the Petition for a Writ of Certiorari.

(Pet. A42). The Court of Appeals denied Petitioners' timely petition for rehearing on September 12, 1974 (Pet. A44). The Petition for a Writ of Certiorari was filed on December 10, 1974 and was granted on March 24, 1975.

Statutory Provisions Involved

The pertinent sections of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, as amended, provide:

Section 703(a), 42 U.S.C. § 2000e-2(a):

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 703(c), 42 U.S.C. § 2000e-2(c):

> It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin.

Section 703(h), 42 U.S.C. § 2000e-2(h):

> Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.

Section 706(g), 42 U.S.C. § 2000e-5(g):

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other

equitable relief as the court deems appropriate. . . . No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).

The Civil Rights Act of 1866, 42 U.S.C. § 1981, provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Question Presented

1. Whether in an action based on Title VII the district courts are prohibited as a matter of law from granting, as part of the remedy to black job applicants unlawfully refused employment, the full seniority they would have obtained but for the employer's discrimination?

2. Whether in an action based on 42 U.S.C. §1981 the district courts are prohibited as a matter of law from granting, as part of the remedy to black job applicants unlawfully refused employment, the full seniority they would have obtained but for the employer's discrimination?

Statement of the Case

This case brings before the Court a pair of related issues from a case that originally raised a broad spectrum of questions correctly answered by the lower courts.[2] At stake is the vitality of the federal courts' power to remedy unlawful employment discrimination.

Petitioners are two black workers formerly employed by Respondent Bowman Transportation Company (hereinafter "Bowman" or "Company") and formerly members of the predecessors of Respondent United Steelworkers of America, International Union of District 50 and its Local No. 13600 (hereinafter "Unions"). Petitioner Franks filed this suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, and 42 U.S.C. § 1981 as a class action pursuant to Rule 23(b)(1), (2), Fed. R. Civ. P., on May 5, 1971 (4a-12a).[3] Petitioner Lee intervened and filed a similar class action complaint on July 21, 1971 (13a-18a). Franks is a discharged former employee of Bowman in the tire shop of its Atlanta, Georgia terminal (7a-8a); Lee is a truck driver initially refused employment by Bowman but later hired and then discharged (16a). Both complaints charged Bowman with across-the-board practices of racial discrimination in all aspects of employment and alleged that the Unions had collaborated in the discrimination (6a-10a, 14a-16a).

Following trial, the United States District Court for the Northern District of Georgia sustained most of Petitioners'

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[2] The Fifth Circuit resolved a multiplicity of issues in its opinion, generally favorably to Petitioners. Respondent Bowman Transportation Company unsuccessfully sought review of several of those questions. O.T. 1974, No. 74-424, *cert. denied*, 42 L.Ed.2d 644 (December 9, 1974).

[3] Citations in this form are to pages of the Single Appendix filed with this brief.

allegations of racial discrimination. It found that Franks, while employed by Bowman, had been discriminatorily excluded from better and higher paying terminal jobs reserved for whites (Pet. A55-A56); and that Bowman had discriminatorily fired Franks for filing a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) (Pet. A56). The district court also found that Bowman's initial refusal to hire Lee as a truck driver in January, 1970 was motivated by his race (Pet. A60, A63); but that Lee's subsequent discharge was for cause (Pet. A62-A63). The district court also found that the Company and Union had engaged in a comprehensive program of race discrimination (Pet. A47-A53). Until 1968, Bowman was "almost totally segregated by race," and every department "adhered to strict racial lines" (Pet. A47). In March, 1968, blacks held only two inferior jobs in the shop department—tire man and clean-up—and comprised less than 1% of the total number of employees (Pet. A48-A49). As late as August, 1971, four months after suit was filed, blacks held less than 5% of Bowman's positions and were still almost totally excluded from the higher-paying traditionally white jobs (Pet. A47-A49).[4] The segregated job structure was maintained by a variety of complementary practices of discrimination, including a "lockout" seniority system, a no-transfer rule, and reliance on word-of-mouth

[4] In August, 1971, Bowman's office and clerical staff remained 100% white. The OTR force included about 2% blacks. The City Driver/Dock Department was about 5% black. All 99 mechanics in the Shop Department were white, while blacks filled 21 of the remaining 28 lower-paying Shop jobs. Pet. A48. In terms of pay disparities, blacks made up 2.2% of all workers earning over $225 per week; 2.7% of workers in the Terminal jobs ranging in pay from $172 to $210 per week; and 76.9% of all workers at the lowest pay level, $175 per week. Pet. A48. In 1970 the Atlanta SMSA population was 22.6% black (Bureau of the Census, *1970 Census of Population, General Population Characteristics—Georgia* 12-69 (1970)).

applicant referrals by incumbent employees (Pet. A47, Pet. A49-A52).

The findings and undisputed evidence proved that Bowman followed a conscious policy to exclude blacks from over-the-road (OTR) driver jobs. The district court found that management had, prior to 1970, followed a deliberate policy of not considering blacks for OTR positions (Pet. A50, see 28a-29a). This policy was in effect when Lee first applied and was rejected.[5] Company officials gave as the reason for their policy the fact that the Company did not have any separate truck cabs, shower or bunk facilities available for black drivers and white drivers would not share these facilities with blacks (Pet. A50, 29a, 34a-35a).[6]

[5] When Lee applied, he had nearly 20 years of driving experience, much of it with tractor/trailer rigs similar to Bowman's and much of it over-the-road (R. 1293-R. 1297) (not reproduced in appendix). Lee's application was filed in January, 1970; he was rejected by letter dated February 13, 1970 (R. 1304, Pet. A60). During January-February, 1970, Bowman hired at least 39 white OTRs (Pl. Ex. P-2 [Table IV B], not reproduced in appendix). One exemplary white hiree, J. H. Jarnigan, who applied just as Lee was being rejected, had no truck driving experience, had two speeding tickets and was involved in an accident, in the eight months before Bowman hired him (R. 1370-71).

Sam Crisco, who hired OTRs from 1967 to 1971 (33a), testified as follows (34a):

> THE COURT: During this time [January, 1970] you weren't hiring any blacks out of the Atlanta Terminal, were you?
>
> THE WITNESS: No, sir.

[6] Sam Crisco testified (34a-35a):

> THE COURT: Wasn't everybody saying they were going to put it off as long as they could?
>
> • • • • •
>
> THE WITNESS: We didn't have the facilities for hiring.
>
> THE COURT: You mean in bunk beds and showers?
>
> THE WITNESS: Yes, sir.
>
> THE COURT: All your drivers were telling you every day not to hire anybody [black] and you decided to tough it out as long as you could, isn't that the fact?

(footnote continued)

In response to Lee's EEOC charge and subsequently to this lawsuit Bowman reverted after 1970 to a policy of putting off "as long as could" the hiring of black OTR drivers at its various terminals (Pet. A50, see 35a). Blacks were first hired on September 11, 1970 at Birmingham terminal; on September 12, 1971 at Richmond; on November 21, 1971 at Atlanta; and on February 15, 1972 (the month before trial) at Charlotte (Pet. A50). As a result of the exclusionary policy, Bowman's OTR workforce remained lily-white:

Date	*White OTRs*	*Black OTRs*	*% Blacks*
July 1965	415	0	0
March 1968	464	0	0
August 1971	499	11	2.2
March 1972 (trial)	532	18	3.3

(Pet. A48; Pet. A18 n.11, *cf.* Pet. A50; Defendant's Ex. 76, not reproduced in Appendix.)

THE WITNESS: Yes, sir, we were waiting until we were confronted with it . . . .

Dwight Rice, who hired OTRs from 1959 to 1968 (26a), testified as follows (28a-29a):

Q. What was the driver force when you came?
A. Well, the road drivers were all white.
Q. Did you discuss this matter with anyone else in the Bowman management?
A. I don't think so at that time.
Q. Did you discuss it with them later?
A. I'm sure I have later.
Q. Can you remember who you discussed it with?
A. I'm sure I have discussed it with most of the officers at one time or another.
Q. And what was the nature of your discussion with these officers?
A. Well, due to the fact that we had about 50% double operation in bunkrooms and shower facilities at many of the terminals, and due to the comments of our white drivers, we didn't think it feasible to hire them [black drivers].

Throughout this period, Bowman rejected applications by experienced and apparently qualified black truck drivers. The district court found that a "handful" of blacks had applied prior to 1970.[7] Black applications had become "substantial" in number by 1970 and thereafter continued to increase.[8] Dozens of these applications showed driving records and experience more than sufficient to meet Bowman's standards.[9] Moreover, throughout this period Bowman continued to hire large numbers of inexperienced white trainees on a "buddy system,"[10] as well as a number of white drivers with substandard driving rec-

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[7] The Court must have been referring only to identifiable black applicants whose applications were discovered and placed in the record. Bowman's hiring officials indicated that a substantial number of blacks had applied. Dwight Rice estimated black applicants at one per month until 1968 (29a); Sam Crisco had about one per week after 1967 (36a-37a).

[8] Pet. A50. Bowman rejected more than 200 black OTR applicants in 1970-71 alone, whose application forms were discovered and summarized in the record (52a [Table VA]; Bowman's answers to plaintiff's third interrogatories #1 [not reproduced in Appendix]).

[9] Bowman required that applicants be 25 years old and physically fit, licensed to drive, and preferred a year or at least six months of tractor/trailer driving experience (38a-39a). But see n.10, *infra*. Of black applicants whose written applications are summarized in the record, at least 127 claimed that they met those standards—but were not hired—33 in 1970 and 94 in 1971 (52a [Table VB]). Bowman admits that it verified the claimed experience of 40 of these rejected applicants—15 in 1970, 25 in 1971 (*id.*).

[10] White driver trainees were hired from 1968-1971 without *any* experience requirements (35a). Bowman trained about 75-150 white drivers in this program (*id.*). In order to be hired as a trainee, the candidate had to have a sponsor already on Bowman's all-white OTR contingent (36a). Bowman took referrals from its OTRs and ultimately delegated to them blanket authority to accept or reject candidates (*id.*).

ords.[11] The record makes clear that, absent discrimination, many of the rejected black applicants would have been hired and would have begun to accumulate seniority with Bowman as OTR drivers.[12]

The trial court held the action maintainable as a Rule 23(b)(2) class action, found class-wide discrimination, and granted limited injunctive relief to class members, but denied affirmative relief and back pay (Pet. A53, Pet. A47-A54, Pet. A65-A68). Of particular pertinence here, the court held that Lee could represent a class of black applicants for over-the-road (OTR) truck driver positions who were denied employment prior to January 1, 1972, which it denominated "Class 3" (Pet. A53, Pet. A66-A67), and ordered that individual notice be given to members of that class (Pet. A67, Pet. A70).

The district court ordered that members of "class 3" be granted the right to re-apply for OTR positions, and if found qualified to hiring with priority over all other applicants (Pet. A66-67).[13] However, the court refused to grant blacks hired pursuant to these provisions seniority as OTR drivers retroactive to the date they would

[11] Bowman could not find enough qualified OTRs to keep pace with its high turnover (41a, 27a). To fill its complement of OTRs, Bowman hired some whites with very bad driving records. See, e.g., n.5 *supra*, and Intervenor's Designation of Evidence Relating to Road Driver Hiring, filed during trial, which summarized information in Plaintiff's Exhibit P-1(s) (not reproduced in appendix).

[12] The evidence summarized in notes 10 and 11 shows that there were always OTR vacancies during the period relevant to this suit.

[13] Discovery on remand from the Court of Appeals' decision has shown that a number of previously rejected black applicants were hired when they re-applied pursuant to the decree. In addition a number were shown as not hired for the same reasons frequently given for rejecting black OTR applicants in 1969-1971. Bowman's Answers to Remand Interrogatories, filed May 1, 1975, Nos. 35-37 (N.D. Ga. C.A. No. 15,086).

have been hired but for Bowman's policy of discrimination (Pet. A54). The court grounded its denial of relief on its view that class remedies are beyond the jurisdiction of Title VII courts, as it had previously held in *United States v. Georgia Power Co.*, —— F.Supp. ——, 3 EPD ¶8318 (N.D. Ga. 1971); this reasoning was subsequently reversed, *United States* v. *Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973). The district court did not consider the meaning of Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h).

The Fifth Circuit affirmed all the trial court's findings of discrimination and extended those findings to several other practices not held unlawful below (495 F.2d at 409-412, Pet. A15-A20); it also granted Petitioners the affirmative injunctive relief denied them below, including class back pay (495 F.2d at 414-22, Pet. A24-A40).[14] In affirming the district court's finding of OTR hiring discrimination, the Court of Appeals held,

> The record in this case shows that Bowman followed a conscious policy of excluding blacks from its OTR Department until September 1970, a time over five years after the effective date of the Civil Rights Act of 1964.

(495 F.2d at 418, Pet. A31). Despite this clear finding of injury, the Fifth Circuit denied Petitioners' request for full seniority relief to those black applicants who were first discriminatorily rejected and later hired. The appellate court, in affirming on this issue, advanced an entirely different rationale from that of the district court. The Court of Appeals held that Section 703(h) of Title

[14] Bowman filed a petition for a writ of certiorari on the class back pay issue, O.T. 1974, No. 74-424. It was denied December 9, 1974, 42 L.Ed.2d 644. Petition for rehearing was likewise denied March 17, 1975, 43 U.S.L.W. 3501.

VII, 42 U.S.C. § 2000e-2(h), prohibits such relief as a matter of law (495 F.2d at 417-8, Pet. A30-A31). The court reasoned that any seniority system based on hiring dates is "bona fide" and, therefore, protected by Section 703(h) even though practices of racial exclusion may have precluded blacks from hiring. Although Petitioners also prayed for relief under 42 U.S.C. § 1981, the court gave no explanation of why any limitations in the Title VII provision should bar relief under a different statute.

Summary of Argument

I.

A. At Bowman as elsewhere in American industry, seniority is a crucial determinant of employment opportunities. In denying black OTR applicants employment, Bowman also denied them the advantages of seniority. The remedy granted by the district court does not restore class members to their "rightful place" in terms of seniority; they will therefore continue to suffer the effects of past discrimination. The Court of Appeals held that discriminatees could never obtain complete seniority relief from past hiring discrimination. Its decision turns on a wooden interpretation of § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), and is heedless of the facts or equities of the case.

B. Nothing in the terms or context of § 703(h) commands the interpretation given it by the Court of Appeals. The section is not a limitation on Title's VII's remedial provision, § 706(g), 42 U.S.C. § 2000e-5(g). It is, rather, merely a clarification of other sections defining discriminatory employment practices. Section 706(g) was intended as, and is, a sweeping remedial provision, *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44-5 (1974). There is no basis for reading § 703(h) as an implied limitation on § 706(g).

C. The legislative history of § 703(h) does not support its interpretation to preclude retroactive seniority relief. The statements sometimes cited for that proposition are not the legislative history of § 703(h); in fact they were made several weeks before § 703(h) was conceived and were virtually ignored by Congress thereafter. These statements express no Congressional purpose as to the issue here. They are, like much of Title VII legislative history, inconclusive, and subject to construction in light of the larger statutory purposes.

D. Policy and precedent require a construction of § 703(h) that assures an effective seniority remedy for rejected applicants. The courts are duty-bound to formulate affirmative equitable relief for victims of discrimination, *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965). A similar policy assures that victims of discrimination in NLRA cases receive retroactive seniority upon reinstatement, whether from unlawful denial of hiring or unlawful discharge, *Phelps-Dodge Corp.* v. *NLRB*, 313 U.S. 177, 188 (1941). The courts have modified facially neutral seniority systems in a variety of cases under Title VII and other statutes, in order to effectuate public policy. In order to serve the policy favoring effective relief to Title VII discriminatees, this Court should hold that § 703(h) does not strip the district courts of power to grant retroactive seniority remedies. *Meadows* v. *Ford Motor Co.*, 510 F.2d 939 (6th Cir. 1975), *cert. filed*, April 25, 1975, O.T. 1974 No. 74-1349; *Jurinko* v. *Edwin L. Wiegand Co.*, 477 F.2d 1038 (3rd Cir. 1973), *vacated and remanded on other grounds*, 414 U.S. 970 (1973).

II.

The court below failed to state any reasons for denying the retroactive seniority remedy under Petitioners' 42 U.S.C. § 1981 cause of action. On its face, the broad language of § 1981 establishes a right to equal seniority rights, and the courts should enforce those rights with appropriate retroactive seniority remedies. Section 703(h) should not be construed as an implied limitation on the scope of § 1981 remedies. The two statutes provide separate and independent remedial schemes, *Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 47-49. Even if, because of § 703(h), retroactive seniority were barred under Title VII, Congress did not express any intention to repeal the similar remedy under § 1981, and a finding of repeal by implication is unwarranted. Rather, as in *Jones* v. *Mayer Co.,* 392 U.S. 409 (1968), the Court should hold that enactment of the recent Civil Rights Acts did not diminish the force of earlier measures. The anomalies inherent either in inconsistent interpretations of Title VII and § 1981 or in a finding of partial repeal of § 1981 by implication provide further reason to reject the Fifth Circuit's construction of § 703(h).

ARGUMENT

I.

Section 703(h) Does Not Prohibit an Award of Retroactive Seniority to Discriminatorily Rejected Job Applicants as Part of Their Title VII Remedy.

A. *The Court of Appeals Formulated a Rule That Would Bar Complete Seniority Relief to Discriminatees Without Regard to the Circumstances or Equities of the Case.*

1. The Inadequacy of Seniority Relief Granted Below.

Employment opportunities for Bowman's truck drivers, as for other workers, depend on their seniority.[15] Bowman employees' seniority runs from their date of hire[16] and is departmental in nature (46a, 48a). Seniority standing determines the order of layoff and recall of qualified em-

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[15] In many industries, a worker's seniority is crucial. Seniority typically determines his opportunities for promotion or transfer to a better job, his choice of shifts or assignments, his right to overtime, pension, vacation rights, and other benefits and privileges of employment. It may likewise determine his degree of job security—protection from demotion due to reduction-in-force and from layoff, his level of support while out of work, and his priority for recall or reinstatement. Seniority in the American labor-management relations system is usually measured by or with relation to the worker's date of employment in a company, plant, department, unit, or job. Thus, the amount or date of applicable seniority is often a critical determinant of an employee's job status and future prospects. For most employees, the basic seniority date is simply the date of hire. Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights,* 75 HARV. L. REV. 1532, 1534-5 (1962); Cooper and Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion,* 82 HARV. L. REV. 1598, 1601-02 (1969); Bureau of National Affairs, *Labor Relations Yearbook* 45-48 (1971) ("Basic Contract Patterns: Seniority—Layoff, Promotion, Transfer").

[16] A hiree establishes seniority only upon completion of a 45 day probationary period. When he does, however, it runs retroactively from date of employment (47a, 49a).

ployees (*id.*). Regular job assignments or "runs" for over-the-road drivers are posted for bidding, and seniority decides competition between qualified bidders (*id.*). Since OTRs are paid on a per-mile basis, their earnings depend on which runs they can obtain by bidding.[17] Company seniority, rather than departmental seniority, determines the extent of a Bowman employee's vacation (48a, 51a) and pension benefits.[18] The seniority date carried by a Bowman OTR driver is therefore crucial to his securing the benefits of his job.

Black OTR applicants discriminatorily rejected by Bowman were thereby deprived of more than a job. They also lost the opportunity and right to begin accumulating seniority that would provide them security from layoff or reduction in work, and ability to compete successfully for desirable or lucrative assignments. They were further prevented from accruing vacation and pension benefits dependent upon length of tenure in the job. Although the district court's decree (affirmed in this respect by the Court of Appeals) purported to restore to Class 3 members the job opportunities previously denied them, it made no effort to restore the seniority rights of which they had also been deprived.

For a worker whose employment date (and therefore his seniority status) is adversely affected by prior hiring discrimination, simple reinstatement to the job with seniority from date of actual hire cannot fully cure the injury done to him. Even after reinstatement as a "new" employee, he carries a badge of inferiority—his inferior

[17] See Bowman's answers to plaintiff's first interrogatories, #10 (d); Bowman's answers to plaintiff's second interrogatories, #3 and #4 (not reproduced in Appendix).

[18] Bowman's answer to plaintiff's first interrogatories, #30 (not reproduced in Appendix).

amount of seniority. Bowman's belated hiring of Class 3 members here pursuant to the district court's decree or otherwise does not return them to their "rightful place." [19] Instead of seniority dates in 1969 or 1970 or 1971, which they would have obtained had Bowman accepted their initial applications, qualified Class 3 members who re-applied now carry (or should carry, under the doctrine employed below) seniority dates of July, 1972 or later.[20] A black OTR who was a Class 3 discriminatee will always have less seniority than all other OTRs who applied *after* the class member's discriminatory rejection but were hired *before* his reinstatement. Likewise, the rejected applicant will lag behind his (nearly all white) contemporaries in fringe benefits as well as competitive standing. The sole cause of this continuing subordination of the rights of Class 3 black OTRs to those of later-applying whites is of course Bowman's pre-1972 discriminatory hiring policy.[21] Cf. *Griggs* v. *Duke Power Co.*, 420 F.2d 1225, 1230-1, 1236 (4th Cir. 1970), rev'd on other grounds 401 U.S. 424 (1971). Class 3 members will suffer ongoing

[19] See, e.g., Local 189 *United Papermakers and Paperworkers* v. *United States*, 416 F.2d 980, 988 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 HARV. L. REV. 1260, 1268 (1967).

[20] See n.13, *supra*. Due to Bowman's high turnover, a year or two of difference in seniority date can make a significant difference in ability to compete by seniority. For example, on defendant's exhibit 76, the OTR seniority roster as of March 1, 1972 (not reproduced in appendix), 228 names separate the first driver hired in 1970 from the first driver hired in 1972.

[21] All subsequently hired Class 3 OTRs are, of course, qualified under Bowman's usual standards. This makes them presumptively *more* qualified than dozens of white OTRs hired as trainees under Bowman's racist "buddy" system, see notes 9, 10, *supra*. Yet those whites who owe their jobs to Bowman's commitment to maintaining a lily-white OTR force at all costs, see notes 10, 11, *supra*, will continue to have priority ahead of black OTRs who applied before them.

injury, and other employees will continue to enjoy advantages gained at the expense of victims of discrimination, as long as any former rejected applicants remain in OTR jobs.

2. The Court of Appeals Holding.

In affirming the denial of seniority relief to rejected OTR applicants, the Court of Appeals did not discuss the impact of its ruling on affected employees in this case. Instead, the Fifth Circuit held that Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), precludes the courts from awarding *any* seniority relief to previously rejected applicants like Class 3 members. Calling the relief sought by plaintiffs "constructive seniority" and characterizing it as "a giant step beyond permitting job competition on the basis of company seniority" (495 F.2d at 417, Pet. A29-A30), the Court found it barred by § 703(h) as construed in dictum in an earlier decision, *Local 189, United Papermakers & Paperworkers* v. *United States,* 416 F.2d 980, 995 (5th Cir. 1969), *cert. denied* 397 U.S. 919 (1970). The Court held that a seniority system based on date of actual employment is by definition a "bona fide seniority system" within the meaning of § 703(h), and concluded that awards of retroactive seniority under such a system are beyond the remedial power of the courts (495 F.2d at 417-8, Pet. A30-A31).

The Fifth Circuit's holding is a judge-made rule limiting Title VII remedies.[22] The decision below articulates an across-the-board rule of law cutting across all factual situations and substituting for the usual play of the equities. Thus, under the rule announced below, rejected applicants

[22] Nothing in the statute explicitly requires imposition of such a limitation see part B, *infra.* Nor does anything in its legislative history command the courts to construe the statute in the manner chosen by the Fifth Circuit, see part C, *infra.*

in *every* case would be barred from full seniority relief for *any* purpose.[23] The circumstances of the discriminatory rejections would not affect application of the undifferentiated rule.[24] Nor would the result be affected by consideration of whether the burden of the remedy fell on discriminatory employers or unions, on other employees who had benefited from the discrimination, or on mere bystanders. The holding below, if adopted here, would condemn all possible cases to a single result.

The Sixth Circuit faced a similar issue in *Meadows* v. *Ford Motor Company,* 510 F.2d 939 (6th Cir. 1975), *cert. filed* April 25, 1975, O.T. 1974 No. 74-1349, but reached a very different result. See discussion at p. 38, *infra.* In *Meadows* the court was particularly concerned with the consequences of granting retroactive seniority in an economic situation requiring layoffs.[25] The court's opinion, which rejects the result in the instant case below, 510 F.2d at 949, acknowledges the complexity of factors bearing on the issue and abjures a flat rule. It remands the case to the district court for development and possible reconciliation of the conflicting factors and the equities, noting that "[w]e

[23] Discriminatees could not seek a remedy allowing competitive use of retroactive seniority to bid for promotions or job assignments, or to resist demotion or layoff; nor could they obtain the full non-competitive fringe benefits of seniority, such as vacation or pension rights.

[24] Among the varying circumstances deemed immaterial by the Fifth Circuit are whether the rejected applicants applied individually or in writing; whether they were rejected before or after Title VII became effective; whether their applications fell within the statute of limitations period applicable to the action; and whether vacancies existed when they applied.

[25] *Meadows,* like the instant action, was not a layoff case but a refusal-to-hire claim. The court's concern in *Meadows* may have been prompted by the severe and well-publicized production cutbacks and employee layoffs in the automobile industry during the winter of 1974-5.

do not assume, as our brethren in the Fifth Circuit appear to . . . that such reconciliation is impossible," *id.* (citations omitted). The carefulness of the Sixth Circuit's treatment of a similar issue serves to highlight the broad-brush approach taken in this case.

B. *Neither the Language of § 703(h) Nor Its Place in the Statutory Scheme Justifies the Construction Adopted Below.*

Section 703(h), 42 U.S.C. § 2000e-2(h), provides in pertinent part:

> Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system. . . .

This provision is one subsection of Section 703 of Title VII, which defines what are (§§ 703(a)-(d), 42 U.S.C. §§ 2000e-2(a)-(d), and are not (§§ 703(e)-(j), 42 U.S.C. §§ 2000e-2(e)-(j), employment practices made unlawful by the Act. Section 703(h) does not by its terms or statutory context state anything about the nature or scope of judicial power to remedy such practices. On its face, the pertinent clause of § 703(h) simply states that an employer does not discriminate by using a "bona fide seniority or merit system." Neither in that section nor in any other part of the Title VII did Congress define what it meant to include under the umbrella of a "bona fide" seniority system.[26] Other clauses of § 703(h) exempt from Title VII's prohibitions an employer's use of "a system

[26] Nor does the legislative history contain any specification of exact meaning, see pp. 24-29, *infra*.

which measures earnings by quantity or quality of production," different compensation or employment conditions for "employees who work in different locations," or the use of "any professionally developed ability test."[27] All these authorizations are subject to the section's caveat against otherwise lawful practices that are "the result of an intention to discriminate because of race, color, religion, sex, or national origin."

Section 703(h) must be read in light of the broad prohibitions of §§ 703(a), (c), 42 U.S.C. §§ 2000e-2(a), (c). Those provisions generally define unlawful employment practices by employers and unions respectively, and are cast in sweeping and inclusive terms. Their broad language would appear to prohibit *any* discriminatory employment practice by a subject entity, unless it is specifically authorized elsewhere.[28] Section 703(h) is therefore a clarification or qualification of §§ 703(a), (c) —that is, a clarification of which employer and union practices Congress meant to prohibit and which to permit.

Section 703(h) is not part of the remedial scheme of Title VII. Judicial remedies under the Act are set out in § 706(f)-(k), 42 U.S.C. §§ 2000e-5(f)-(k), and particularly in § 706(g), 42 U.S.C. § 2000e-5(g).[29] Section 706(g) is as broad in its grant of remedial power to the district courts

[27] See *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Albemarle Paper Co.* v. *Moody*, O.T. 1974 Nos. 74-389, -428, argued April 14, 1975.

[28] See, e.g., *Local 189, United Papermakers and Paperworkers* v. *United States, supra*, 416 F.2d at 982; *Rowe* v. *General Motors Corp.*, 457 F.2d 348, 354 (5th Cir. 1972); *Griggs* v. *Duke Power Co., supra*, 401 U.S. at 429-31 (1971).

[29] The Court is now weighing the proper construction of this subsection in another context, *Albemarle Paper Co.* v. *Moody, supra*.

as §§ 703(a) and (c) are in their definition of unlawful practices. It authorizes the award, upon a finding of liability, of "such affirmative action as may be appropriate," including but not limited to "reinstatement or hiring of employees, with or without back pay . . . *or any other equitable relief as the court deems appropriate*" (emphasis supplied).

Congress intended § 706(g) to give district courts plenary power to fashion complete relief appropriate to the facts of each case. It clarified and reiterated that intention in passing the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103 (1972), which reenacted § 706(g) (with modifications not material here). The Section-by-Section analysis prepared by the Senate-House Conference Committee states of § 706(g):

> The provisions of this subsection are intended to give the court *wide discretion exercising their equitable powers to fashion the most complete relief possible.* In dealing with the present section 706(g) the courts have stressed that *the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole,* and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that *persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.* 118 Cong. Rec. 7168 (1972); see also 118 Cong. Rec. 4942 (1972) (emphasis supplied).

This Court has previously noted the broad sweep of § 706(g) and the Congressional purpose underlying it, *Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 44-5. Nowhere, in the language or structure of Title VII, did

Congress indicate that § 703(h) was to be construed as a limitation on the grant of authority contained in § 706(g).

The construction given § 703(h) by the Court of Appeals in effect reads its definitional limitations into § 706 (g)'s remedial authorization. Although it thereby treated the separate subsections as a unit, the court below made no effort to discuss the terms of § 706(g) or reconcile them with the meaning it found in § 703(h). This Court's and Congress's understanding of the clear meaning of § 706(g) cannot be reconciled with the Court of Appeals' interpretation of § 703(h).

C. *The Legislative History of Section 703(h) Does Not Support the Construction of the Court Below.*

The Fifth Circuit's decision strips the district courts of their traditional power to devise effective equitable remedies appropriate to the circumstances of each case—a power that is particularly crucial in civil rights litigation —by its reading of §703(h). Such a statutory construction should not be adopted in the absence of clear indications that Congress intended to impose a limitation on relief which is nowhere expressed in the statute's terms and is on its face inconsistent with Title VII's broad remedial purpose. The legsilative history[29a] provides no basis for the limiting construction of § 703(h). In construing the section to bar retroactive seniority, the Court of Appeals did not rely on, or even refer to, its sparse legislative history. However, other courts have carefully examined the legislative history of Title VII in ruling on closely related issues —and have arrived at opposite conclusions.[30] As these

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[29a] The judicial search for the meaning of statutory provisions leads first to the text of the statute and then to its purpose, it is primarily as an aid to deciphering an unclear or disputed purpose that the courts look to legislative history. Frankfurter, *Some Reflections on the Reading of Statutes,* 47 COLUM. L. REV. 527, 535-44 (1947).

[30] Compare, *e.g., Waters* v. *Wisconsin Steel Works of International Harvester Co.,* 502 F.2d 1309, 1317-20 (7th Cir. 1974),

diverse results indicate, the legislative history of § 703(h) does not on its face clearly reveal any Congressional intention with respect to the question presented.

The bill that eventually became Title VII[31] did not, as initially introduced, contain § 703(h), its language, or indeed any limiting provision on seniority. On the contrary, a dissenting minority of the House Judiciary Committee, which reported the bill out with favorable recommendation, argued that the bill would destroy all seniority systems.[32] The bill's proponents made no effort to refute these state-

cert. filed February 21, 1975, O.T. 1974 No. 74-1064 (legislative history found "supportive" of Fifth Circuit's construction, 502 F.2d at 1318); and *Jersey Central Power & Light Co.* v. *Local Union 327 et al.*, 508 F.2d 687, 706-10 (3rd Cir. 1975) (Congress "intended" the Fifth Circuit's result, 508 F.2d at 706); with *Watkins* v. *United Steel Workers of America, Local No. 2369*, 369 F. Supp. 1221, 1227-29 (E.D. La. 1974), appeal docketed 5th Cir. No. 74-2604 (June 17, 1974) (legislative materials found unpersuasive in contravening plain statutory language prohibiting seniority discrimination). *Meadows* v. *Ford Motor Co., supra*, which rejects the holding in this case below, does not discuss the history of § 703(h), but relies on the related history of § 706(g) discussed at p. 22, *supra*, as "illuminating," see 510 F.2d at 942-3, 949.

[31] H.R. 7152 (1963), see H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963).

[32] The minority protested that,

> If the proposed legislation is enacted, the President of the United States and his appointees—particularly the Attorney General—would be granted the power to seriously impair . . . the seniority rights of employees in corporate and other employment [and] the seniority rights of labor union members within their locals and in their apprenticeship program. . . .
>
> *The provisions of this act grant the power to destroy union seniority.* . . . with the full statutory powers granted by this bill, *the extent of actions which would be taken to destroy the seniority system is unknown* and unknowable. H. Rep. No. 914, 88th Cong., 1st Sess. 64-66, 71-72 (emphasis supplied).

See also, 110 Cong. Rec. 2726 (1964) (remarks of Rep. Dowdy).

ments. An amendment to exempt from Title VII's proscriptions all employment practices based on a seniority system was defeated on the House floor.[33] The bill passed the House without any seniority provision, 110 Cong. Rec. 2804 (1964), and went directly to the Senate floor where it was extensively debated in the course of a prolonged filibuster. There the bill's co-sponsor, Senator Clark, placed in the record on April 8, 1964, three documents commenting on the bill's effect upon seniority rights. At the time of these insertions, the bill still contained neither § 703(h) nor any specific seniority language. The three documents are an Interpretative Memorandum prepared by the Department of Justice, 110 Cong. Rec. 7206-07,[34] the "Clark-Case Interpretative Memorandum," 110 Cong. Rec. 7212-15,[35] and a set of prepared answers by Senator Clark to

[33] The proposed amendment provided "[t]he provisions of this title shall not be applicable to any employer whose hiring and employment practices are pursuant to (1) a seniority system . . . ." 110 Cong. Rec. 2727 (1964). It was rejected, 110 Cong. Rec. 2728 (1964).

[34] The Department of Justice Memorandum states in pertinent part:

> Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by Title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. Title VII is directed at discrimination based on race, color, religion, sex or national origin. It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is low man on the totem pole he is not being discriminated against because of his race. 110 Cong. Rec. 7207.

[35] The "Clark-Case Memorandum," states that:

> Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title

questions suggested by Senator Dirksen, 110 Cong. Rec. 7215-17.[36] There was no floor debate or commentary on any of these materials, or of their treatment of the seniority issue, either when they were introduced or thereafter.

The formulation of § 703(h) began some weeks later. The section's language first appeared as part of a substitute "Dirksen-Mansfield" bill, authored by a bipartisan leadership group in order to break the filibuster by vote of cloture, see 110 Cong. Rec. 12706-07 (1964). The substitute was introduced by Senator Dirksen on May 26, 1964, 110 Cong. Rec. 11,926, 11,930-34, and presented by Senator Humphrey on June 4, 1964, 110 Cong. Rec. 12,708-09, 12,721-

comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired to give them special seniority rights at the expense of the white workers hired earler. (However, where waiting lists for employment or training are, prior to the effective date of the title, maintained on a discriminatory basis, the use of such lists after the title takes effect may be held an unlawful subterfuge to accomplish discrimination.) 110 Cong. Rec. 7213.

[36] Two of the prepared responses are pertinent to the question here.

> Question. Would the same situation prevail in respect to promotions when that management function is governed by a labor contract calling for promotions on the basis of seniority? What of dismissals? Normally, labor contracts call for 'last hired, first fired.' If the last hired are Negroes, is the employer discriminating if his contract requires that they be first fired and the remaining employees are white?
>
> Answer. Seniority rights are in no way affected by the bill. If under a 'last hired, first fired' agreement a Negro happens to be the 'last hired,' he can still be 'first fired' as long as it is done because of his status as 'last hired' and not because of his race. 110 Cong. Rec. 7217.
>
> • • •
>
> "Question. If an employer is directed to abolish his employment list because of seniority discrimination, what happens to seniority?
>
> Answer. The bill is not retroactive, and it will not require an employer to change existing seniority lists."

22. It replaced the Clark bill in its entirety and modified it substantially.[37] Section 703(h) appeared in its final form in the substitute bill, see 110 Cong. Rec. 12,813 (1964). Senator Humphrey, in explaining the addition of § 703(h), merely reiterated its terms and commented, "[t]he change does not narrow application of the title, but merely clarifies its present intent and effect," 110 Cong. Rec. 12,723 (1964). The other principal author of the substitute measure, Senator Dirksen, did not explain the new section except by briefly repeating its terms in conclusory fashion, 110 Cong. Rec. 12,818-19 (1974). No other Senator, including Senators Clark and Case, attempted to debate or amend (or even discussed) § 703(h) before final passage of Title VII. After the Senate passed the Mansfield-Dirksen substitute and just before House passage, the bill's House Manager, Rep. Celler, explained the changes made in H.R. 7152 by the substitute Title VII measure, 110 Cong. Rec. 15,896 (1964). Although he noted a number of trivial changes,[38] as well as significant modifications including the provision of § 703(h) permitting non-discriminatory ability tests, Rep. Celler did not mention its "bona fide seniority system" language, *id.* After final passage of Title VII, Rep.

[37] The Senatorial deadlock that produced the substitute was not to any significant extent over seniority. The proscriptions on employment discrimination contained in the Title VII bill were merely one part of an historic omnibus bill which also had controversial titles prohibiting, *inter alia*, discrimination in public accommodations (Title II, see 42 U.S.C. §§ 2000a *et seq.*) and in federally-assisted programs including public and private schools (Title VI, see 42 U.S.C. §§ 2000d *et seq.*). Even limiting the analysis to Title VII provisions, the critical issue was not over seniority but whether EEOC should have any enforcement powers and if so of what nature ("cease-and-desist" or right to sue in federal court). See, e.g., 110 Cong. Rec. 12,721-22 (1964) (remarks of Senator Humphrey).

[38] Among the minor revisions Rep. Celler called to the attention of House members were the deletion of a section exempting discrimination against atheists, an exemption for Indian-owned corporations, and the application of the Hatch Act to EEOC employees. 110 Cong. Rec. 15,896 (1964).

McCullough, "who had much to do with the passage and also the preparation of the civil rights bill," 110 Cong. Rec. 15,998 (1964) (remarks of Sen. Dirksen), prepared a comparative analysis of the original House-passed bill and the final Senate version. That analysis notes that the House version lacked any § 703(h) provision, but describes the Senate-added section solely as authorizing use of professionally developed ability tests, 110 Cong. Rec. 16,002 (1964). Senator Dirksen, introducing this analysis to the Senate, described it as "highly informative," 110 Cong. Rec. 15,998 (1964).

Reliance on the three undebated Clark memoranda as expressing the legislative purpose of § 703(h) is unwarranted. The memoranda were inserted in the record weeks before § 703(h) was conceived. None of the substitute's architects, nor indeed any other Congressman, drew any specific link between the memoranda and the section. The Senators principally responsible for Title VII as enacted, including § 703(h), stated that it was not designed to change or narrow the Act's prohibitions. The Representatives most knowledgeable and concerned about the House bill, which had overruled the strong protests of some members in rejecting any seniority limitations, did not advise the House that any change had been made in its position by the Senate version. In order to sustain the Fifth Circuit's reading of § 703(h) as imposing a severe restriction on the application of Title VII to seniority systems, it would be necessary to assume that the Congressmen most intimately involved in Title VII's final enactment either were unaware of the secret meaning of the section, or chose to conceal it from their colleagues.[38a]

[38a] To adopt that assumption "would be like sanctioning the practice of Caligula who 'published the law, but it was written in a very small hand, and posted up in a corner, so that no one could make a copy of it'." *Screws* v. *United States*, 325 U.S. 91, 96 (1945) (opinion of Mr. Justice Douglas concurring in judgment).

Moreover, the courts have already indicated in a closely related context[39] that they do not take the Clark materials at face value to define the content of § 703(h). Read literally, the three insertions would seem to declare Title VII without *any* effect on established seniority rights.[40] Yet the courts have unanimously rejected that notion as inconsistent with the true Congressional purpose.[41] They reason quite simply that a "bona fide" seniority system within the meaning of § 703(h) is one that does not have racially discriminatory effects; those that have such effects are "the result of an intention to discriminate on the basis of race" and are specifically exempted from the qualification of § 703(h).[42] The Clark statements therefore do not express

[39] The context is that of the "job seniority" cases, see p. 35, *infra*.

[40] See, e.g., the following statements:

"Title VII would have no effect on seniority rights existing at the time it takes effect." Department of Justice Interpretative Memorandum, 110 Cong. Rec. 7207 (1964).

"Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective." Clark-Case Interpretative Memorandum, 110 Cong. Rec. 7213 (1964).

"Answer: The bill is not retroactive, and it will not require an employer to change existing seniority lists." Clark-Dirksen responses, 110 Cong. Rec. 7217 (1964).

[41] See, e.g., *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505, 515-8 (E.D. Va. 1968) ("It is also apparent that Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the Act"); *Local 189, United Papermakers and Paperworkers* v. *United States, supra*, 416 F.2d at 988, 996; *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971), *cert. dismissed* 404 U.S. 1006 (1971); *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652 (2nd Cir. 1971); and see *Watkins* v. *United Steel Workers of America, Local No. 2369, supra*, 369 F. Supp. at 1228-9.

[42] *Quarles* v. *Philip Morris, Inc., supra*, 279 F. Supp. at 517; *Local 189, United Papermakers and Paperworkers* v. *United States, supra*, 416 F.2d at 995-6; *United States* v. *Bethlehem Steel Corp., supra*, 446 F.2d at 659.

the will of Congress as to seniority. Cooper and Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598, 1611-1614 (1969).

Even if the Clark memoranda could be treated as expressing Congressional intentions, their application to the present case (and a wide range of other current Title VII seniority issues) is at best problematical. The materials purport to discuss *only* the issue of what changes would be wrought in seniority by the enactment of Title VII. They do not address the question of remedies available upon a finding of discrimination that has continued after the effective date of the Act. The continuation of Bowman's racial policy of exclusion long after it had been legally condemned, an eventuality not contemplated in the Clark materials on seniority, creates a context in which the application of dubious legislative history to produce remedial restrictions would be particularly inappropriate, cf. *Watson* v. *City of Memphis*, 373 U.S. 526, 529-30 (1963).

There is simply no clear legislative history to support the meaning affixed to § 703(h) by the Fifth Circuit. This conclusion is not surprising; as this and other courts have remarked, Title VII's broad terms and tortured Congressional history often provide faint guidance along the path to specific constructions. *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 57.[43] Mr. Justice Frankfurter, analyzing § 8(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3), aptly wrote:

[43] In *Local 189, United Papermakers and Paperworkers* v. *United States*, *supra*, 416 F.2d at 987—the decision that the court below purported to follow—the Fifth Circuit noted that "the legislative history of the Title [VII] is singularly uninstructive on seniority rights." See also, *Johnson* v. *Seaboard Air Line R. Co.*, 405 F.2d 645, 649, 651 (4th Cir. 1968), *cert. denied* 394 U.S. 918 (1969); *Miller* v. *International Paper Co.*, 408 F.2d 283, 286 n. 13 (5th Cir. 1969); *Voutsis* v. *Union Carbide Corp.*, 452 F.2d 889, 891-2 (2nd Cir. 1971), *cert. denied* 406 U.S. 918 (1972).

> Unlike mathematical symbols, the phrasing of such social legislation as this seldom attains more than approximate precision of definition. That is why all relevant aids are summoned to determine meaning. Of compelling consideration is the fact that words acquire scope and function from the history of the events which they summarize.

Phelps-Dodge Corp. v. *N.L.R.B.*, 313 U.S. 177, 185-186 (1941). That remark is equally applicable to Title VII and its § 703, which like § 8(3) is the basic guarantee against discrimination given to individual workers by a major remedial labor law. And a review of the broad context of § 703(h) confirms that Congress did not intend the Fifth Circuit's construction to prevail. See parts B and D, *infra*.

D. *Section 703(h) Should Be Construed in Keeping With National Labor Policy to Permit Remedial Grants of Retroactive Seniority by District Courts.*

Here as in *Griggs* v. *Duke Power Co.*, *supra*, the employer and union are engaged in seniority practices that perpetuate past hiring discrimination, and Petitioners seek a Title VII remedy for those practices. In construing § 703(h) to bar retroactive seniority in all cases, the court below contravened the strong public policy favoring effective seniority remedies for victims of unlawful employment practices. To effectuate that policy, as enunciated and applied in decisions under both Title VII and other federal laws governing labor, this Court should reject the Fifth Circuit's interpretation.

1. Affirmative remedies for civil rights violations.

In Title VII cases as in other civil rights areas, "the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discrim-

inatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965).[44] In keeping with this remedial principle, this Court has recognized that practices racially neutral on their face may become unlawful when they act as impediments to the complete disestablishment of previously overt segregation. *Green* v. *School Board of New Kent County*, 391 U.S. 430, 439-41 (1968) (need to eliminate pattern of school segregation "root and branch" renders "freedom of choice" plan unlawful); *Monroe* v. *Board of Commissioners*, 391 U.S. 450, 459 (1968) ("free transfer" plan unacceptable unless it furthers elimination of prior segregation); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430 (1971). The Court has therefore approved district courts' broad use of their "historical equitable remedial powers," *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 17 (1971), to provide a complete remedy. Congress has adopted that principle and drafted, in § 706(g), 42 U.S.C. § 2000e-5(g), a remedial provision giving courts plenary power to fulfill their duty, see p. 22, *supra*. In particular Congress has directed that victims of discrimination "be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination," 118 Cong. Rec. 7168 (1972). The circuit courts have consistently recognized the directive "to make the victims of unlawful discrimination whole," *id.*,[45] as a means of assuring *effective* relief to victims of discrimination.[46]

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[44] See also, *Local 53, International Association of Heat and Frost Insulators & Asbestos Workers* v. *Vogler*, 407 F.2d 1047, 1052-3 (5th Cir. 1969).

[45] *United States* v. *Georgia Power Co.*, 474 F.2d 906, 927 (5th Cir. 1973); *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711, 719-20 (7th Cir. 1969); *Head* v. *Timken Roller Bearing Co.*, 486 F.2d 870, 876 (6th Cir. 1973).

[46] *Vogler* v. *McCarty, Inc.*, 451 F.2d 1236, 1238 (5th Cir. 1971); *Patterson* v. *Newspaper & Mail Deliverers' Union*, —— F.2d ——, 9 EPD ¶10,033 (2nd Cir. 1975); *NAACP* v. *Allen*, 493 F.2d 614, 619 (5th Cir. 1974); *Rios* v. *Enterprise Ass'n Steamfitters Local 638*, 501 F.2d 622, 629 (2nd Cir. 1974).

In holding that § 703(h) automatically validates all employment-date seniority systems, the Court of Appeals ignored the distinction between facially neutral practices which freeze prior patterns of discrimination, and truly fair practices in an environment untainted by past segregation or practices which actually help to eliminate the effects of past discrimination. The prohibitory construction adopted below converts § 703(h) into an obstacle preventing the courts from fulfilling their duty and the legislative intent that affirmative relief be available to cure racism's lingering effects. Such a construction subverts Title VII's whole purpose.

2. The remedial policy of the NLRA.

The Fifth Circuit's holding would exclude from the courts' arsenal of Title VII powers a remedy both available and routinely awarded in similar actions under the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* Practice under the NLRA is particularly pertinent to the Title VII issue here because Congress intended § 706(g) to confer authority similar to that of the NLRA's remedial provision, § 10(c), 29 U.S.C. § 160(c). 110 Cong. Rec. 6549 (1964) (remarks of Senator Humphrey), H.R. Rep. No. 914, 88th Cong. 1st Sess. 112 (1963).[47]

In applying § 10(c), this Court has followed the principle that victims of unlawful labor practices are entitled to reinstatement to the same position they would have held

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[47] See *United States* v. *Georgia Power Co.*, *supra*, 474 F.2d at 921 n. 19; *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 252 (5th Cir. 1974); *Developments in the Law-Employment Discrimination and the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1259 n. 349 (1971).

but for the illegal acts. *N.L.R.B.* v. *Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969). Any lesser remedy is inadequate because it leaves the employee worse off as a result of the unlawful practice. *Id.; Golden State Bottling Co.* v. *N.L.R.B.*, 414 U.S. 168, 187-8 (1973), *aff'g* 467 F.2d 164, 166 (9th Cir. 1972). In fashioning remedies pursuant to § 10(c) for unlawful hiring practices, the NLRB and the courts have awarded the same relief ordinarily available to unlawfully discharged employees—reinstatement with full seniority to the date of the unlawful act.[48] These decisions are mandated by this Court's holding in *Phelps-Dodge Corp.* v. *N.L.R.B.*, *supra*, 313 at 188:

> Experience having demonstrated that discrimination in hiring is twin to discrimination in firing, it would indeed be surprising if Congress gave a remedy for the one which it denied for the other. . . . To differentiate between discrimination in denying employment and in terminating it, would be a differentiation not only without substance but in defiance of that against which the prohibition of discrimination is directed.

There is no doubt that an employee discriminatorily discharged in violation of Title VII is entitled, as part of his § 706(g) remedy, to reinstatement with retroactive seniority to the date of his unlawful discharge.[49] In its holding

[48] *Atlantic Maintenance Co.* v. *N.L.R.B.*, 305 F.2d 604 (3rd Cir. 1962), *enf'g* 134 NLRB 1328 (1961); *N.L.R.B.* v. *Lamar Creamery Co.*, 246 F.2d 8, 10 (5th Cir. 1957), *enf'g* 115 NLRB 1113 (1956); *N.L.R.B.* v. *Cone Bros. Contracting Co.*, 317 F.2d 3, 7 (5th Cir. 1963).

[49] *Newman* v. *Avco Corp.*, —— F. Supp. ——, 8 EPD ¶9769 (M.D. Tenn. 1974), *granting relief on remand from* 451 F.2d 743 (6th Cir. 1971); *Pettway* v. *American Cast Iron Pipe Co.*, —— F. Supp. ——, 4 EPD ¶7651 (N.D. Ala. 1970), *granting relief on remand from* 411 F.2d 998 (5th Cir. 1969); *Shaffield* v. *Northrop Worldwide Aircraft Services, Inc.*, —— F. Supp. ——, 7 EPD ¶9223 (M.D. Ala. 1974).

here, the Fifth Circuit therefore drove a wedge between relief available under § 706(g) for discriminatory discharge and for discriminatory refusal to hire. That result is not only contrary to the recognition expressed in *Phelps-Dodge* that "discrimination in hiring is twin to discrimination in firing," 313 U.S. at 188; it is also anomalous in that it denies Title VII relief to persons who would be clearly entitled to the same remedy under the NLRA had their rejection been for union activities, instead of race and color. In enacting Title VII, Congress cannot have meant to afford lesser protections for minority citizens than it had granted union members.

3. Modification of seniority systems to implement public policy.

The restriction on seniority relief imposed by the Fifth Circuit is inconsistent with several related lines of decisions which modify seniority systems for reasons of public policy. In cases involving "job seniority" or "department seniority" systems against a backdrop of historical discrimination the courts have consistently ordered substitution of "company" (employment date) seniority as a remedial measure.[50] These decisions measure seniority by employment date not because that standard is necessarily lawful, but because in the circumstances of those cases it gave meaningful relief from the effects of past discrimination against a class of incumbent employees. The court below incorrectly read this line of decisions as requiring

[50] Indeed, the instant case presented this same issue, and the Court of Appeals resolved it in plaintiffs' favor, 495 F.2d at 414-7, Pet. A24-A29. See also, *Local 189, United Papermakers and Paperworkers* v. *United States, supra; United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418, 448-55 (5th Cir. 1971); *Robinson* v. *Lorillard Corp., supra; United States* v. *Chesapeake & Ohio R. Co.*, 471 F.2d 582, 587-94 (4th Cir. 1973), *cert. denied* 411 U.S. 939 (1973); *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354, 361-6 (8th Cir. 1973); *Head* v. *Timken Roller Bearing Co.*, 486 F.2d 870, 875-6 (6th Cir. 1973).

adherence to "company" seniority in cases involving rejected job applicants, 495 F.2d at 417-8, Pet. A30. The same remedial principle on the facts of this case requires a different seniority remedy for Class 3 members, who were denied any opportunity to work for the Company and thereby to build "company" seniority.[51]

In a series of decisions involving discriminatory union hiring hall and referral practices, the courts have rejected use of employment date seniority as a measure of priority for work.[52] Instead, the courts require referral of black workers even though they lack the seniority that union discrimination prevented them from obtaining. As a result newly-admitted blacks are thereby enabled to compete successfully with whites of much greater actual tenure of membership or employment. The court below held orders permitting such competition impermissible in this case.

As both the departmental-seniority cases and the union-referral cases recognize, effective seniority remedies for persons injured by discrimination inevitably affect the seniority expectations of white workers who may have to compete with them using remedial seniority measures.

> . . . Title VII guarantees that all employees are entitled to the *same* expectations regardless of 'race, color, religion, sex, or national origin.' Where some employees now have lower expectations than their co-workers because of the influence of one of these forbidden factors, they are entitled to have their expectations raised even if the expectations of others must be lowered in order to achieve the statutorily mandated equality of opportunity. *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 800 (4th Cir. 1971), *cert. dismissed* 404 U.S. 1006 (1971).[53]

Seniority expectations have been subjected to modification not only for remedial purposes under Title VII, but also to implement other strong public policies. Under the Selective Training and Service Act of 1940, 50 U.S.C. App. §§ 301 *et seq.*, and the Selective Service Act of 1948, 50 U.S.C. App. §§ 451 *et seq.*, a veteran returning to his former employer must receive seniority credit for time he did *not* work while in the armed forces, 50 U.S.C. App. § 459(c) (1967).[54] And a collective bargaining agreement that gave seniority credit to veterans for periods spent in military service *prior* to initial employment was upheld in *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 334-335 nn. 6, 7, 339-340 (1953). In *Huffman* this Court specifically stated that seniority need *not* be defined strictly by "relative length of employment of the respective employees," 345 U.S. at 342,[55] and indicated that different measures of

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[51] See *Rowe* v. *General Motors Corp.*, 457 F.2d 348, 358 (5th Cir. 1972) (employer could not use actual length of employment as factor governing promotions, where effect would be to make previously excluded blacks "once again . . . go to the foot of the line").

[52] *United States* v. *Sheet Metal Workers, Local 36*, 416 F.2d 123, 131 (8th Cir. 1969); *Dobbins* v. *Electrical Workers Local 212*, 292 F. Supp. 413 (S.D. Ohio 1968), *aff'd as later modified sub nom. United States* v. *Local Union 212*, 472 F.2d 634 (6th Cir. 1973); *EEOC* v. *Plumbers Local Union No. 189*, 311 F. Supp. 468, 474-6 (S.D. Ohio 1970), *vac'd on other grounds* 438 F.2d 408 (6th Cir. 1971), *cert. denied* 404 U.S. 832 (1971).

[53] See also, *United States* v. *Bethlehem Steel Corp., supra*, 446 F.2d at 663; *Vogler* v. *McCarty, Inc., supra*, 451 F.2d at 1238.

[54] See also, 5 U.S.C. § 3502(a) (1966) (federal employee receives credit for time spent in military service for purpose of resisting layoff based on length-of-service).

[55] *Accord: Aeronautical Industrial District Lodge 727* v. *Campbell*, 337 U.S. 521, 527 (1949). In both *Huffman* and *Campbell*, the Court construed seniority provisions of a collective bargaining agreement in such a way as to avoid injury to persons whom Congress intended to place in a protected category.

seniority might be used in order to effectuate a variety of public purposes, *id.*, at 338-9.

4. Retroactive seniority serves public policy.

Because of its rigid interpretation of § 703(h), the court below had no occasion to consider whether its holding would effectuate or obstruct the public interest. Two other circuits have sharply disagreed with the Fifth Circuit's approach. In *Meadows* v. *Ford Motor Company, supra,* a class action involving discriminatory refusals to hire on the basis of sex, the court squarely held, "[t]here is, however, no prohibition to be found in the statute which prohibits retroactive seniority," 510 F.2d at 949. While reserving judgment on the application of retroactive seniority to layoff situations, the court specifically noted that its reservation would not apply to fringe benefits dependent on seniority.[56] And in *Jurinko* v. *Edwin L. Wiegand Co.,* 477 F.2d 1038, 1047 (3rd Cir. 1973), *vacated and remanded on other grounds* 414 U.S. 970 (1973), the Third Circuit reversed a district court's refusal to award retroactive seniority to two female job applicants discriminatorily rejected on the basis of sex. The court correctly held,

> We can perceive no basis for the trial court to have refused to award back seniority or for its conclusion that "the plaintiffs are to be offered employment in production with the company, of course, as new employees." Seniority is, of course, of great importance to production workers for it determines both opportunities for job advancement and the order of layoff

[56] "We perceive no reason why that date in these cases should be other than the date which the trial court fixes as the date when the employee would have been hired, absent the illegal hiring practice which the District Court has identified and enjoined," 510 F.2d at 949.

> in the case of a reduction in a company's operating forces. It is our view that the plaintiffs are entitled to seniority and back pay dating from the time of the discriminatory employment practice up to the time they are actually reinstated. Only in this way will the present effects of the past discrimination be eliminated. 477 F.2d at 1046.[57]

It is furthermore the apparent policy of the Department of Justice to seek retroactive seniority as part of the remedy for hiring discrimination in its "pattern-and-practice" cases brought pursuant to 42 U.S.C. § 2000e-6.[58]

Jurinko and *Meadows* correctly perceive the issue as one of policy not predetermined by a clear statutory prohibition. The Fifth Circuit's contrary reading of the statute on narrow grounds cannot be reconciled with this Court's recognition that "national labor policy embodies the principles of non-discrimination as a matter of highest priority," *Emporium Capwell Co.* v. *Western Addition Community Organization,* 43 L. Ed. 2d 12, 25 (1975), *Alexander* v.

[57] On remand from this Court, the Third Circuit reexamined and reaffirmed its initial opinion, —— F.2d ——, 7 EPD ¶9215 (1974). It then remanded the cause to the district court, 497 F.2d 403 (1974). The district court issued the required opinion granting retroactive seniority, —— F. Supp. —— (W.D. Pa. C.A. No. 69-225, November 22, 1974).

[58] See, e.g., *United States* v. *Georgia Power Co.,* —— F. Supp. ——, 7 EPD ¶9167 (N.D. Ga. 1974), *entering decree on remand from* 474 F.2d 906 (5th Cir. 1973); *United States* v. *Roadway Express, Inc.,* C.A. No. C-68-321 (N.D. Ohio September 1, 1970) (consent decree), *aff'd* 457 F.2d 854 (6th Cir. 1972); *United States* v. *Navaho Freight Lines, Inc.,* C.A. No. 72-116-MML (C.D. Cal. January 15, 1973) (supplementary order to consent decree); *United States* v. *Pilot Freight Carriers, Inc.,* C.A. No. C-143-WS-71 (M.D.N.C. October 31, 1972) (consent decree). All of these decrees were obtained prior to the decision below; to our knowledge neither the Department of Justice nor the EEOC has obtained similar relief in a pattern-and-practice action since that decision.

Gardner-Denver Co., supra, 415 U.S. at 47. That policy requires that the district courts should have and exercise the power to grant retroactive seniority as a remedy for exclusionary hiring practices like Bowman's.

II.

The District Courts Have Authority to Grant Retroactive Seniority Relief Under 42 U.S.C. § 1981.

Although the Court of Appeals referred repeatedly in other parts of its opinion to Petitioners' cause of action under 42 U.S.C. § 1981 (see Pet. A8-A9, A39), it made no mention of that section in rejecting the claim for retroactive seniority. Apparently the court assumed that a seniority system held immune under Title VII must necessarily evade the proscription of § 1981.[59] But the terms of § 1981 and its relationship with Title VII, which the court did not analyze, require reversal of its conclusion.

Section 1981 assures black persons the same right "to make and enforce contracts" as white citizens. The Courts of Appeals have unanimously concluded that those protected contract rights include the employment contract with a private employer.[60] Employment under a collective

[59] Cf. *Waters* v. *Wisconsin Steel Works of International Harvester Co., supra,* 502 F.2d at 1320 n.4, wherein the Seventh Circuit disposed of a related § 1981 claim in one sentence: "Having passed scrutiny under the substantive requirements of Title VII, the employment seniority system utilized by Wisconsin Steel is not violative of 42 U.S.C. § 1981."

[60] E.g., *Gresham* v. *Chambers,* 501 F.2d 687, 690-1 (2nd Cir. 1974); *Young* v. *International Telephone & Telegraph Co.,* 438 F.2d 757, 759-60 (3rd Cir. 1971); *Brown* v. *Gaston County Dyeing Machine Co.,* 457 F.2d 1377, 1379 (4th Cir. 1972), *cert. denied* 409 U.S. 982 (1972); *Sanders* v. *Dobbs Houses, Inc.,* 431 F.2d 1097, 1101 (5th Cir. 1970) *cert. denied* 401 U.S. 948 (1971); *Caldwell* v. *National Brewing Co.,* 443 F.2d 1044, 1045 (5th Cir. 1971) *cert. denied* 405 F.2d 916 (1972); *Long* v. *Ford Motor Co.,*

bargaining agreement governing, *inter alia,* seniority is such a contract. Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights, supra,* 75 HARV. L. REV. at 1533-4. The contractual rights secured by the collective bargaining agreement between defendants here include the right of employees to establish seniority on the date of hiring and to accumulate and use it thereafter (see pp. 15-16, *infra*). Enforcement of this contract right necessarily encompasses enforcement of the full rights and benefits of such seniority. If a black person is denied the same right as white citizens to make a contract for seniority, § 1981 requires at least that the courts possess the power to restore to such black person the right "to make and enforce" the contract previously denied him. If courts lacked this power, § 1981 would confer a right without a remedy, a construction that is both inequitable and irrational. Cf. *J. I. Case Co.* v. *Borak,* 377 U.S. 426, 433-4 (1964); *Mitchell* v. *Robert de Mario Jewelry, Inc.,* 361 U.S. 288, 291-2 (1960); *Sullivan* v. *Little Hunting Park, Inc.,* 396 U.S. 229, 239 (1969) (construing 42 U.S.C. § 1982 to provide a full remedy for racial discrimination).

Section 703(h) of Title VII should not be read to bar a full remedy, which necessarily includes retroactive seniority, under § 1981. Squarely to the contrary, this Court has held,

496 F.2d 500, 503 (6th Cir. 1974); *Waters* v. *Wisconsin Steel Works of International Harvester Co.,* 427 F.2d 476, 481-8 (7th Cir. 1970), *cert. denied* 400 U.S. 911 (1970); *Brady* v. *Bristol-Myers Co.,* 459 F.2d 621, 623-4 (8th Cir. 1972); *Macklin* v. *Spector Freight Systems, Inc.,* 478 F.2d 979, 993-4 (D.C. Cir. 1973).

This Court has not yet had occasion to rule on the applicability of § 1981 to private employment. But see *Johnson* v. *Railway Express Agency, Inc.,* O.T. 1973 No. 73-1543, argued December 11, 1974.

> ... (L)egislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination[7] . . . [T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination.

[7] See, e.g. 42 U.S.C. Section 1981 (Civil Rights Act of 1966); 42 U.S.C. Section 1983 (Civil Rights Act of 1871).

Alexander v. *Gardner-Denver Co., supra,* 415 U.S. at 47-49. The reasoning of *Alexander* endorses both clear legislative history and principles settled in the lower courts. In 1964 and 1972 Congress rejected amendments that would have made Title VII the exclusive judicial remedy for employment discrimination. 110 Cong. Rec. 13650-52 (1964); H. R. Rep. No. 92-238 at p. 79 (1971); S. Rep. No. 92-415 at p. 24 (1971); *Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 48 n. 9. Congress thus intended that § 1981 offer a separate and independent remedy from that of Title VII, *id.*

The Courts of Appeals have properly construed these legislative materials to establish § 1981 as a separate and, in significant respects, different grant of remedial authority. In *Guerra* v. *Manchester Terminal Co.,* 498 F.2d 641 (5th Cir. 1974), the Fifth Circuit held that although Title VII does not prohibit discrimination based on alienage,[61] § 1981 does.[62] In *Macklin* v. *Spector Freight Systems, Inc.,* 478 F.2d 979, 996 (D.C. Cir. 1973), the District of Columbia Circuit characterized Title VII and § 1981 as having "radically different schemes of enforcement" and differing "widely in their substantive provisions." The court in *Alpha Portland Cement Co.* v. *Reese,* 507 F.2d 607 (5th Cir. 1975), ruled that § 1981 might authorize class relief where Title VII did not.[63] See also, *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor,* 442 F.2d 159, 172 (3rd Cir. 1971), *cert. denied* 404 U.S. 854 (1971) (§ 703(j) of Title VII, 42 U.S.C. § 2000e-2(j), companion section to § 703(h), cannot limit remedies based on laws other than Title VII.

[61] See *Espinoza* v. *Farah Manufacturing Co.,* 414 U.S. 86 (1973).

[62] The court in *Guerra* noted that § 1981 expresses "a humane and remedial policy," and stated, "Congress intended Title VII to be an important, but not the only, weapon in the arsenal against employment discrimination," 498 F.2d at 650. It justified holding that § 1981 prohibits some forms of employment discrimination that Title VII does not touch by reasoning that in reconciling the two statutes, the goal must be:

> to mitigate the harshness to those accused of employment discrimination resulting from what one source has characterized as "multiple jeopardy," [footnote omitted] while preserving and protecting for those complaining of discriminatory employment practices the full panoply of remedies guaranteed them by the federal laws.[46]

[46] We emphasize that though Title VII § 1981, and Section 8 of the NLRA may overlap in the area of employment discrimination, their confluence must not be exaggerated. They are separate, independent statutes. The procedures under them vary; the available remedies may differ significantly, and, as the case at bar illustrates, conduct creating liability under one may not create liability under another.

498 F.2d at 658.

[63] The court in *Reese* rejected a policy argument against extension of § 1981 remedies beyond the reach of Title VII, stating:

> Accepting [the employer's] proposition arguendo, the policy choice is one already made by Congress in creating Title VII as a remedy supplemental to and separate from that existent under § 1981. 507 F.2d at 609 (footnote omitted).

To hold that the broad, unqualified language of § 1981 is limited by the narrow terms of § 703(h) (as construed below) would require finding that the later statute repealed or superseded the earlier one as to the seniority issue here. Such repeals by implication are not favored. *Morton* v. *Mancari*, 417 U.S. 535, (1974) (enactment of Title VII did not repeal remedial provisions of existing law); *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936) ("the intention of the legislature to repeal must be clear and manifest"); *United States* v. *Borden Co.*, 308 U.S. 188, 198-9 (1939); *United States* v. *Price*, 383 U.S. 787 (1966).[64] Six Courts of Appeals have rejected the proposition that the enactment of Title VII repealed pre-existing remedies under § 1981[65]; no circuit has ruled otherwise. The circuit courts' decisions are mandated by three recent decisions of this Court which refuse to read the detailed civil rights legislation of the 1960's to narrow relief available under the more general post-Civil War acts. *Jones* v. *Mayer Co.*, 392 U.S. 409, 416 n. 20 (1968) ("The Civil Rights Act of 1968 [42 U.S.C. §§ 3601 *et seq.*] does not mention 42 U.S.C. § 1982, and we cannot assume that Congress intended to effect any change, either substantive or procedural, in the prior statute"); *Sullivan* v.

[64] In *Price* the Court dealt with another post-Civil War enactment to rectify racial injustices (18 U.S.C. § 241) and held that its "plain and unlimited" language should not be restricted. It wrote, in words applicable here,

> We think that history [of events surrounding its enactment] leaves no doubt that, if we are to give [the statute] the scope that its origins dictate, we must accord it a sweep as broad as its language. 383 U.S. at 801.

[65] *Gresham* v. *Chambers*, *supra*, 501 F.2d at 691, *Young* v. *International Telephone and Telegraph Co.*, *supra*, 438 F.2d at 760-3; *Sanders* v. *Dobbs Houses, Inc.*, *supra*, 431 F.2d at 1100-01; *Waters* v. *Wisconsin Steel Works of International Harvester Co.*, *supra*, 427 F.2d at 484-5; *Brady* v. *Bristol Myers Co.*, *supra*, 459 F.2d at 623-4; *Macklin* v. *Spector Freight Systems, Inc.*, *supra*, 478 F.2d at 993-4.

Little Hunting Park, Inc., *supra*, 396 U.S. at 237, 238 (Title II of Civil Rights Act of 1964, 42 U.S.C. §§ 2000a *et seq.*, does not supersede provisions of 42 U.S.C. § 1982); cf. *Tillman* v. *Wheaton-Haven Rec. Ass'n.*, 410 U.S. 431 (1973) (rejecting on factual grounds argument that exemption in Title II, 42 U.S.C. § 2000a(e), suits under §§ 1981, 1982).

Title VII's broadly remedial policy, see pp. 21-22, *supra*, makes it particularly inappropriate to read § 703(h) as limiting remedies otherwise available under § 1981. The thrust of Title VII was to eliminate employment discrimination by "supplementing" other remedies, not to cut back on their utility or efficacy, cf. *Morton* v. *Mancari*, *supra*, 417 U.S. at 549-50 (1974).

Like Title VII, the post-Civil War acts were broadly remedial in purpose, *Sullivan* v. *Little Hunting Park*, *supra*, 396 U.S. at 237, and it would violate the spirit of § 1981's enactment to limit its remedial effect, cf. *Phelps-Dodge Corp.* v. *N.L.R.B.*, *supra*, 313 U.S. at 186. Moreover, the extension to § 1981 of any limitations contained in § 703(h) directly contradicts the Congressional understanding that earlier legislation would not be undermined. The construction of § 703(h) by the Fifth Circuit therefore offends the purpose of both statutes as well as the canon against repeals by implication. The manifold problems occasioned by this interpretation can be avoided by simply concluding that § 1981 means what it says, and § 703(h) required no change in that meaning. This Court should hold that the trial court is empowered to grant plaintiffs their remedy of retroactive seniority under 42 U.S.C. § 1981.

CONCLUSION

The issue here, although narrow, has broad implications. The Court must decide only whether by enacting § 703(h) Congress deprived district courts of the statutory and equitable power to grant relief from employment discrimination whenever the relief would entail an award of retroactive seniority to rejected job applicants. The Court need not here decide precisely what forms of relief may be appropriate. That task falls in the first instance to the district courts. Nor does the Court face the question of when such relief is appropriate in a case of any particular type, e.g., a layoff case, a recall case, a promotion case, a hiring case, or a benefits case. Yet if the doctrine announced below becomes law, no complete remedy may be granted in any case of hiring discrimination.

For the reasons stated herein, this Court should hold that § 703(h) does not stand as a barrier to appropriate retroactive seniority relief under Title VII and 42 U.S.C. § 1981. The judgment of the Fifth Circuit should be reversed.

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No. 74-728

HAROLD FRANKS and JOHNNIE LEE,
Petitioners,

vs.

BOWMAN TRANSPORTATION, INC., et al.,
Respondents.

BRIEF FOR RESPONDENT BOWMAN TRANSPORTATION, INC.

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-728

HAROLD FRANKS and JOHNNIE LEE,
Petitioners,

vs.

BOWMAN TRANSPORTATION, INC., et al.,
Respondents.

BRIEF FOR RESPONDENT BOWMAN TRANSPORTATION, INC.

QUESTIONS PRESENTED

The second question as stated by petitioners cannot be raised in this Court, because it was not raised in the Court of Appeals, and was not considered or decided by that court. This subject is discussed further in the argument.

The question as stated by petitioners, under the present facts, requires the additional question whether the Court of Appeals correctly held that the District Court did not abuse its discretion in refusing to grant seniority from the date of their rejection to black applicants denied employment as road drivers.

STATEMENT OF THE CASE

This respondent does not agree entirely with petitioners' statements concerning the holdings of the courts below.

In denying retroactive seniority to rejected applicants, the District Court stated the same reasons which were given for its denial of class back pay. It deemed that such relief was not warranted in class actions, and it would bypass the statutory administrative prerequisites to personal suit and thus thwart the Act's emphasis on conciliation and private settlement. Also, the Court stated that it was denying this remedy, along with class back pay, in the exercise of its discretion (Pet. A53-A54).[1]

The Court of Appeals reversed the holding that either Rule 23(b)(2) or Title VII prohibits back-pay awards to unnamed class members. Since it appeared that the District Court had exercised its discretion under a view of the applicable law which the appellate court deemed erroneous, the latter court vacated the portion of the decree denying back pay to the class, and remanded for reconsideration of this issue (Pet. A37-A40). The court did not decide that class members were entitled to back pay.

The Court of Appeals refused to grant application-date seniority to class members who were denied employment. The court stated that this extension of such constructive seniority as a remedy was not permitted under section 703(h) of Title VII, 42 U.S.C. §2000e-2(h) (Pet. A30). This view was not relied upon by the District Court. Despite its statement of this view, the holding of the Court of Appeals was that the District Court "did not abuse its

1. References in this form are to the appendix to the petition for a writ of certiorari.

discretion in refusing to create constructive seniority for black OTR applicants who were rejected as a result of Bowman's discriminatory policy" (Pet. A31).

SUMMARY OF ARGUMENT

I.

A. Although not requiring the denial of retroactive seniority in every instance to applicants rejected in violation of Title VII, section 703(h) places a substantial limitation on Title VII. The legislative history reflects the intent of Congress that the 1964 Act should not impair seniority rights already established, even though black persons had been excluded from employment in the unit to which the seniority applied, and that future layoffs or other personnel action might, without violation of Title VII, be based on seniority affected by past racial discrimination. This interpretation was placed on the bill before Congress even before the offering of the substitute bill containing section 703(h). Upon the passage of the substitute bill (Mansfield-Dirksen amendment), this limitation became statutory. A seniority system, even after Title VII, does not lose its bona fide status through racial discrimination in hiring.

B. The limitation of section 703(h) applies to remedies under section 703(g), 42 U.S.C. §2000e-5(g), as well as to substantive provisions of the Act. The applicability of section 703(h) as a limitation upon remedies is controlled by the decision of this Court in *H. K. Porter Company, Inc.* v. *N.L.R.B.*, 397 U.S. 99 (1970), dealing with a similar question arising under the National Labor Relations Act, 29 U.S.C. §151 et seq.

II.

The District Court sustained its jurisdiction only under Title VII, and its findings of fact and law were based only on Title VII, not upon 42 U.S.C. §1981. The petitioners did not raise in the Court of Appeals any question about this limited basis of the District Court's findings and remedy, and did not assert there that section 1981 provided a basis apart from Title VII for their claim to retroactive seniority as a remedy. Consequently, this question was not considered or decided by the Court of Appeals. Under controlling authorities, this point, not considered below, may not be raised in the Supreme Court. *De Sylva* v. *Ballentine*, 351 U.S. 570 (1956).

III.

A. Title VII does not change the established principle that the district courts have broad discretion in framing equitable remedies. This discretion may be exercised to grant or withhold a particular kind of relief. The action of the federal chancellor should be sustained unless there is an abuse of discretion. This principle, followed under other federal statutes, is also recognized under Title VII. *Meadows* v. *Ford Motor Co.*, 510 F.2d 939 (6th Cir. 1975), cert. filed April 25, 1975, O.T. 1974, No. 74-1349; *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 195-198 (1941); *Hecht Co.* v. *Bowles*, 321 U.S. 321 (1944).

B. In framing the remedy, the District Court exercised its discretion consistently with the purposes of Title VII. The decree not only gives a large measure of restitution to unnamed class members, but provides for preferential recruitment and hiring of black persons, not limited to victims of discrimination, to remove the visible signs of past discrimination against other black persons. The court

thus sought to promote the dual objectives of giving substantial restitution to victims and possible victims of discrimination, and preventing present or future discrimination. This remedy represents a proper exercise of the court's discretion and was entitled to be sustained on appeal.

C. The District Court properly made a distinction between individual claims of the persons who had resorted to the administrative procedures under Title VII and brought the court action, and the class members whose individual claims had not been submitted to the EEOC. The court acted consistently with the purposes of Title VII in granting individual redress to the individual complainants and in granting to the class members the kind of relief that could be applied to the class as a whole. This exercise of discretion is supported by the court's desire to avoid its own inundation with a mass of detail, and by the congressional purpose under Title VII to promote conciliation of employment discrimination cases. The court's limitation of the scope of the litigation was within its discretion in authorizing a class action under Rule 23(b)(2). This rule, contemplating "injunctive or declaratory relief applicable to the class as a whole," also supports the remedy framed by the District Court.

ARGUMENT

I.

Although Not Requiring the Denial of Retroactive Seniority in All Instances to Applicants Denied Employment in Violation of Title VII, Section 703(h) Places a Substantial Limitation on Rights and Remedies Under the Act.

A. This Section Protects Seniority Rights Under Bona Fide Systems Affected by Past Racial Discrimination.

The company agrees that section 703(h) does not deprive a district court of power, in its discretion, to grant retroactive seniority in Title VII actions to complainants who have been denied employment in violation of the Act. However, the company does not agree with petitioners' interpretation which seeks to read this section out of the statute. Section 703(h) places a substantial limitation upon rights and remedies under Title VII. Its terms and legislative history reflect a congressional purpose to protect seniority rights attributable to pre-Act employment, even during periods when blacks were excluded from the seniority unit. The protection also extends logically to seniority accruing under bona fide systems after the passage of Title VII, but the section should not, under all circumstances, prevent the award of seniority within the system to an applicant discriminatorily denied employment.

This section gives protection to bona fide seniority systems. The statute does not define a "bona fide" system, but in view of the widespread use of seniority in American industry the meaning is rather clear. There is no general

attack here on the seniority system. It gives priority in job competition, primarily in cases of layoff and assignment of "regular runs" (48a-50a), based on length of employment in the seniority unit. It can hardly be argued that this kind of system in itself lacks bona fides.

Petitioners offer an interpretation of the legislative history of 703(h) which, if accepted, would practically nullify this part of the statute. They also suggest that the present application of seniority systems affected by past racial discrimination is a violation of Title VII, reasoning in part that a seniority system with racially discriminatory effects is not a "bona fide" system. Although the present case does not involve questions of discrimination before Title VII, the principle suggested by petitioners would apparently bring into question the present use, in personnel decisions, of seniority attributable to employment during a period of past racial discrimination, even including discrimination antedating Title VII. Bowman, like many employers, has a seniority system giving credit for employment, before and after the passage of Title VII, during periods of black exclusion (under the findings of this case) from relevant employment. The company thus wishes to avoid a statutory interpretation which would have widespread effect on vested seniority rights. It is submitted that petitioners' construction of the statute is not correct, and is based largely upon an erroneous interpretation of the legislative history.

It is not contended that this section gives protection to a seniority system which is not presently neutral along racial lines. If the system is designed to separate "white jobs" from "Negro jobs", it is not bona fide. Through an extension of this reasoning, the courts have tended to overturn or modify seniority systems which are less than plant-wide in scope and tend to place incumbent Negroes under

a continuing disadvantage. See *Local 189, United Papermakers and Paperworkers* v. *U. S.*, 416 F.2d 980 (5th Cir. 1969), cert. den. 397 U.S. 919 (1970); *U. S.* v. *Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971), cert. den. 406 U.S. 906 (1972); *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505 (D.C. Va. 1968). However, the Fifth Circuit stated correctly that discrimination in hiring does not affect the bona fides of the seniority system (Pet. A30). Discrimination of this type can be remedied in a proper case by restitution with appropriate seniority credit, but the system itself is still bona fide and continues within the protection of 703(h).

The enactment of this section reflects the concern of Congress that Title VII might have a detrimental effect on existing seniority rights. Obviously many seniority systems were in effect whose incumbents had received preference through racial discrimination. This section indicates that these seniority rights may be recognized without violation of Title VII. The Act was to be prospective in application, and would not seek to remedy discrimination that occurred in the past. Without section 703(h), it could be argued with some logic that any present personnel decision was in violation of Title VII if it was based on seniority acquired during a period of exclusion of Negroes. This section makes certain that the seniority system cannot be brushed aside as not bona fide merely because its present application has a racially disparate impact. Thus section 703(h) gives a status quo effect to existing seniority systems that are bona fide and to seniority rights under those systems. If it applied only to seniority systems having no present adverse effect upon minority persons, the section would be a meaningless appendage to the Act. A construction is to be favored which gives meaning to this section.

The legislative history, although not extensive, indicates strongly that Title VII was not intended to impair seniority rights acquired during a period of exclusion of blacks before the effective date of the 1964 Act. On April 8, 1964, Senator Clark, one of the bipartisan captains of Title VII,[2] introduced into the record three documents expressing the view that Title VII as drafted would not require revision of seniority practices in plants from which blacks had formerly been excluded. These were an interpretative memorandum prepared by the Department of Justice at Senator Clark's request,[3] an interpretative memorandum prepared by Senators Clark and Case,[4] and

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2. 110 Cong. Rec. 6528 (1964).

3. 110 Cong. Rec. 7207 (1964). The relevant portion of this memorandum is as follows:

> First, it has been asserted that Title VII would undermine vested rights of seniority. This is not correct. Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by Title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. Title VII is directed at discrimination based on race, color, religion, sex or national origin. It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is "low man on the totem pole" he is not being discriminated against because of his race. Of course, if the seniority rule itself is discriminatory, it would be unlawful under Title VII. If a rule were to state that all Negroes must be laid off before any white man, such a rule could not serve as the basis for a discharge subsequent to the effective date of the title. I do not know how anyone could quarrel with such a result.

4. 110 Cong. Rec. 7212-15 (1964). The relevant portion of this memorandum is as follows:

> Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when

(Continued on following page)

responses prepared by Senator Clark to questions posed by Senator Dirksen.[5]

After a series of meetings of Senate leaders, including Senators Mansfield, Dirksen and Humphrey, for the preparation of amendments to the bill, the Mansfield-Dirksen amendment was offered on May 26, 1964, as a substitute for the entire bill. This amendment contained section 703(h).[6] The substitute bill passed the Senate without further discussion of seniority practices.[7] It also passed the House unchanged without debate on the seniority issue.[8] Just before the final vote, Representative McCulloch, a supporter of the bill, said that the bill did not permit the federal government to destroy the job seniority rights of union or non-union employees.[9]

Footnote Continued—

the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier. (However, where waiting lists for employment or training are, prior to the effective date of the title, maintained on a discriminatory basis, the use of such lists after the title takes effect may be held an unlawful subterfuge to accomplish discrimination.)

5. 110 Cong. Rec. 7217 (1964). One response stated that seniority rights were in no way affected by the bill, and added specifically that under a "last hired, first fired" agreement a Negro who happened to be the last hired could be the first fired so long as this action was taken because of his status as the last employee hired and not because of his race. See Cooper and Sobol, "Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion," 82 Harvard Law Review, 1598, 1609-10 (1969) [hereinafter cited as "Cooper and Sobol"].

6. Cooper and Sobol, p. 1610.

7. 110 Cong. Rec. 14,511 (1964).

8. 110 Cong. Rec. 15,897 (1964).

9. 110 Cong. Rec. 15,893 (1964).

The House bill made no express reference to seniority systems. Some members of the Judiciary Committee dissented from the favorable report on Title VII, in part on the ground that it would require the revision of seniority practices by plants that had previously refused to hire blacks.[10] Representative Dowdy proposed an amendment providing that the provisions of this title "shall not be applicable to any employer whose hiring and employment practices are pursuant to: (1) a seniority system . . ."[11] This amendment was defeated without discussion or debate.

Petitioners discount the Clark statements on the ground that they were made before section 703(h) was added to Title VII, and therefore were not addressed to that section. There is also some case and law review authority for this view.[12] However, a different interpretation of the legislative history is more logical.

The questions raised by Senator Dirksen, to which the Clark memoranda were directed, indicated the fear among some senators that Title VII would result in impairment of existing seniority rights, particularly where blacks in the past had been excluded from employment. The strong statements that the Act would not affect these seniority rights were made even without the aid of section 703(h). The bill then contained no provision giving specific protection to seniority rights. Senator Dirksen, who raised the question, was a member of the group of Senate leaders who prepared the substitute bill containing section 703(h). Apparently there was lingering doubt about the effect of

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10. H. R. Rep. No. 94, 88th Congress, 1st Sess., 64-66, 71-72.

11. 110 Cong. Rec. 2726 (1964).

12. *Watkins* v. *Steelworkers Local 2369*, 369 F.Supp. 1221 (D.C. La. 1974); Cooper and Sobol, p. 1613.

the Act on seniority rights even after the introduction of the Clark memoranda. The protection of seniority rights was then made statutory by the addition of 703(h). It is not likely that the substitute bill, with this section added, gives less protection to established seniority rights than that already read by implication into the bill containing no express protection of seniority.

The wording of 703(h) is not substantially different from that of the Clark memoranda. The reference to "bona fide" seniority systems is apparently a precaution against improper use of seniority as a cloak for discrimination. But a primary purpose of 703(h) was to protect seniority rights acquired during pre-Act periods of racial discrimination. Because of this history of discrimination, the giving of continued effect to these seniority rights will naturally have some impact along racial lines. However, the meaning of section 703(h) is that bona fide seniority systems will survive the ban of Title VII, and the system does not lose its "bona fide" status because of the past exclusion of blacks, particularly before the effective date of Title VII.

The rejection of the Dowdy amendment sheds no light on the meaning of section 703(h). Since this amendment was defeated without discussion or debate, there is no indication of a reason for this action. However, an obvious basis for objection appears in the wording of the amendment, which would have the effect of excluding the employer himself from coverage rather than just his seniority practices. Furthermore, the rejection of that amendment loses most of its significance in face of the subsequent enactment of section 703(h).

In summary, although section 703(h) does not provide a complete statutory obstacle to the granting of retroactive seniority to applicants rejected in violation of Title VII,

this section places a substantial limitation on the substantive provisions of the Act. There should be no impairment of seniority rights under bona fide systems which antedated Title VII. Similarly, recognition should be given to post-Title VII seniority rights accruing under bona fide systems, but these rights may be affected by the grant of retroactive seniority, in the discretion of the district court, to discriminatees granted restitution under Title VII decrees. For reasons hereafter discussed, this remedy should ordinarily be included only in individual relief to claimants before the court, and should not be included in the general injunctive relief to unnamed class members.

B. Section 703(h) Places a Limit on Remedies Which May Be Granted Under Title VII.

Petitioners state correctly that section 703(h) appears in the part of the Act which defines employment practices made unlawful by the statute. It does not on its face relate directly to remedies. However, it does not follow that this section has no effect on remedies.

A similar question was considered by this Court and decided adversely to petitioners' position in *H. K. Porter Company, Inc.* v. *N.L.R.B.*, 397 U.S. 99 (1970). That case, arising under the National Labor Relations Act, involved similar considerations. The NLRB had held that the employer did not bargain in good faith upon a union proposal for checkoff dues. Since the employer had refused in bad faith to agree to this proposal, the Board's remedy included a requirement that the employer agree to the checkoff clause. Before this Court the Board argued that Section 8(d) of the Act, 29 U.S.C. §158(d), providing that the obligation to bargain does not require either party to accept a proposal or make a concession, applies only to the sub-

stantive provisions defining unfair labor practices and is not a limitation upon the Board's remedial powers.

Although observing that as a matter of strict, literal interpretation the relevant portion of section 8(d) refers only to the occurrence of a violation and not to the question of remedies, this Court stated, in substance, that it did not follow from this observation that the remedial powers of the Board were not limited by the same consideration which led to the enactment of section 8(d). Since this section prohibits the Board from relying on a refusal to agree as the sole evidence of bad-faith bargaining, the Court thought it would be anomalous to hold that the Act permitted the Board to compel agreement as a matter of remedy. Although the Board's remedial powers are broad, they are limited to the effectuation of the policies of the National Labor Relations Act. Thus the Court held that the Board was prohibited under section 8(d) from ordering the respondent to accept the checkoff proposal.

The same reasoning is applicable to the present question concerning the effect of section 703(h). The considerations which led Congress to except established seniority rights from the operation of the substantive provisions of Title VII logically require that remedies be limited in the same manner. Unless the limitation operates also upon remedies, the policy behind it would be defeated. This question should be controlled by the reasoning followed in *H. K. Porter.*

If this question is reached, the remedy available under section 1981 should still be limited by section 703(h). The 1866 Act does not provide a comprehensive scheme of regulation of race discrimination in employment. It provides only a general principle, and a body of substantive law under section 1981 must be fashioned by the federal

courts in the manner followed under section 301 of the Labor Management Relations Act, 29 U.S.C. §185, under the mandate of *Textile Workers* v. *Lincoln Mills of Alabama,* 353 U.S. 448 (1957). See also *Teamsters, Local 174* v. *Lucas Flour Co.,* 369 U.S. 95 (1962); *Nat. Metropolitan Bank* v. *U. S.,* 323 U.S. 454 (1945); *Clearfield Trust Co.* v. *U. S.,* 318 U.S. 363, 366-367 (1943). The decision in *Johnson* v. *Railway Express Agency,* infra, holding that the claims under the statutes are separate, does not relate to the development of a body of substantive law under section 1981.

In order to avoid an anomalous situation, in fashioning this body of substantive law the courts must follow the more specific and more comprehensive regulation of employment discrimination contained in Title VII. Any other course will lead to undesirable conflicts of substantive law. If a seniority system passes scrutiny under Title VII, it should be held not to violate section 1981. This reasoning, applied in *Waters* v. *Wisconsin Steel Works of International Harvester Co.,* 502 F.2d 1309 (7th Cir. 1974), provides a key to accommodation of the two statutes, and finds strong support in the approach taken by this Court to the resolution of similar problems under section 301.

II.

Since All Findings of Discrimination and the Remedy Were Based on Title VII, and Not on Section 1981, the Latter Statute Provides No Basis for Additional Seniority Relief.

The complaint recites that this action was brought under Title VII and under 42 U.S.C. §1983, and that it is based on deprivation of rights under Title VII and 42 U.S.C. §1981 (4a, 14a). However, the District Court's findings

and conclusions of law are based entirely on Title VII, and not upon section 1981 or 1983 (Pet. A45, A52-A54). The District Court referred to the 1866 Act only in holding that the individual claim of the plaintiff Franks under section 1983 was barred by a Georgia statute of limitations (Pet. A59). Before the Court of Appeals petitioners made no contention that the District Court had erred in limiting its findings and conclusions to Title VII, or that the findings should be expanded to show violations also of section 1981. The Court of Appeals did not overturn or change the findings of the District Court in this respect. In withholding retroactive seniority from rejected applicants, the Court of Appeals was expressly applying Title VII, and did not discuss the availability of further relief under section 1981 (Pet. A30). Thus petitioners, in contending that section 1981 provides a basis, apart from Title VII, for the requested relief are raising a question not considered or decided by the Court of Appeals.[13]

This Court has recently emphasized that a claim under section 1981 is distinct and independent of an action under Title VII. *Johnson* v. *Railway Express Agency*, ... U.S. ....., 10 FEP Cases 817 (1975). Thus in *Johnson* the state statute of limitations applicable to the 1981 action was not tolled during the pendency of a charge before the EEOC. In the present case the claim under section 1981, not sustained by the District Court and not submitted to the Court of Appeals, is separate and independent of the Title VII claim under which the seniority relief was denied. It is too late for petitioners to seek to revive the claim under section 1981 as a basis for the award of additional seniority to class members.

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13. Even after the decision of the Court of Appeals, the petitioners did not assert in their petition for rehearing that retroactive seniority should have been provided specifically under section 1981 even though it was not available under Title VII.

The Supreme Court has long applied the rule that it will not decide a point urged in an attack upon a judgment below, where the question was not raised in the Court of Appeals. *De Sylva* v. *Ballentine*, 351 U.S. 570 (1956); *McCullough* v. *Kammerer Corp.*, 323 U.S. 327 (1945); *Helvering* v. *Minnesota Tea Co.*, 296 U.S. 378, 380 (1935); *Zellerbach Paper Co.* v. *Helvering*, 293 U.S. 172, 182 (1934); *cf. Marshall* v. *Pletz*, 317 U.S. 383, 390 (1943); *Langnes* v. *Green*, 282 U.S. 531, 535-539 (1931). There is no reason here for departure from this principle.

III.

The District Court Properly Exercised Its Discretion in Denying Retroactive Seniority As a Remedy, and This Exercise of Discretion Was Correctly Sustained on Appeal.

A. The Principal Discretion in Framing Remedies Under Title VII Lies with the District Court.

In the determination of the nature and scope of the equitable remedy the primary discretion lies with the district court. The remedy must be consistent with the purposes of the statute,[14] but so long as he acts consistently with that purpose the district judge as federal chancellor has a wide range of discretion in granting or denying any particular relief.

The granting or withholding of the seniority remedy rested within the discretion of the district judge. In exercising this discretion the court could properly consider a number of factors. The grant of seniority as a remedy

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14. See *Bowles* v. *Goebel*, 151 F.2d 671, 674 (8th Cir. 1945); *cf. Wirtz* v. *B. B. Saxon*, 365 F.2d 457 (5th Cir. 1966).

necessarily affects conflicting interests of different employees. Seniority by its nature is intended to have an effect upon job competition. A benefit in the form of additional seniority to a group of employees works a corresponding detriment to other employees. The proper accommodation of these competing interests rests in the discretion of the district judge framing the decree. Also properly to be considered is the interest of the employer in having an experienced work force. The Title VII decree should be remedial and not punitive.

The district judge may also give consideration to the absence of notice to incumbent employees whose seniority standing would be impaired by the grant of retroactive seniority to persons hired under the decree. These employees have not had an opportunity to protect their interests. This factor was deemed important in *Meadows* v. *Ford Motor Co.*, 510 F.2d 939 (6th Cir. 1975). This problem is not solved by joinder of the union as a party, since the union as bargaining agent has an equal obligation to persons already hired preferentially under the District Court's decree.

Other considerations are appropriate. In *E.E.O.C.* v. *Detroit Edison*, ... F.2d ....., 9 EPD ¶9997 (6th Cir. 1975), the court held that retroactive seniority should be denied because the government as class representative had not requested it. Also appropriate is the distinction drawn by the District Court in this case between individual and class remedies (discussed below). In dealing with a similar question involving transferees to road driving, the Sixth Circuit in *Thornton* v. *East Texas Motor Freight*, 497 F.2d 416 (6th Cir. 1974), sustained a distinction between employees who had not requested transfer and those who had made a request for transfer or had filed a charge with

the EEOC. The district court, exercising its discretion to limit the seniority credit granted to both groups, provided retroactive seniority for the latter group beginning six months after their initial request for transfer, if then qualified (but not earlier than six months after the effective date of Title VII), while the group not requesting transfer was to have seniority beginning 18 months after they became qualified for road positions (but not before July 1, 1967). The appellate court rejected the contention that the transferees should have a full seniority carryover since transfers without full seniority would perpetuate past discrimination. In holding that the district court had properly declined to dislodge incumbent over-the-road drivers, the appellate court stated that the legislative history of Title VII "shows a clear congressional intent to lodge wide discretionary powers in district judges in fashioning remedies."

The district judge could also give consideration to the need for this remedy as a means of giving substantial restitution to anyone who might be a victim of discrimination. Since the record reflects that the company was experiencing an annual turnover of approximately 50 percent among road drivers (27a, 41a), it can be seen that any person hired preferentially under the decree would move rapidly up the seniority ladder. The discretion of the District Court could properly have been influenced by the apparent lack of need for this remedy.

The district judge exercised his discretion to withholding the remedy in question. There was no basis on appeal for overturning this exercise of discretion. The Court of Appeals concluded that the District Court had not abused its discretion in declining to grant retroactive seniority. Even if the Court of Appeals erroneously con-

ceived the effect of section 703(h), it correctly upheld the District Court's exercise of discretion.[15]

This Court has sustained the traditional discretion of courts of equity to withhold equitable relief under other statutes. In *Hecht Co.* v. *Bowles*, 321 U.S. 321 (1944), this Court considered such a question arising under emergency wartime legislation for the control of prices. Section 205(a) of the Emergency Price Control Act provided for issuance of an injunction by the district court upon application of the administrator. Although a literal reading of the statute suggested that the granting of the injunction was perhaps mandatory, this Court held that the district judge had the power to withhold this remedy. The following passage from the opinion is pertinent here (321 U.S. at 329-330):

> * * * We are dealing here with the requirements of equity practice with a background of several hundred years of history. Only the other day we stated that "An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determination of courts of equity." * * * The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied. * * *

15. Where the court reaches a correct result but gives the wrong reason, its judgment should be sustained. *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943); *J. E. Riley Co.* v. *Commissioner of Internal Revenue*, 311 U.S. 55 (1940); *Helvering* v. *Gowran*, 302 U.S. 238, 245 (1938).

The Court gave that statute an interpretation which afforded equity courts an opportunity to follow their traditional practices in treating proceedings under that Act.

The court's discretion to withhold a particular remedy has been frequently sustained in cases under Title VII. In *Meadows* v. *Ford Motor Company*, 510 F.2d 939 (6th Cir. 1975), a decision which petitioners assert to be in conflict with the holding below on the effect of section 703(h), the court recognized that the grant or denial of retroactive seniority to rejected applicants was a matter within the discretion of the trial court. Similarly, in *Thornton* v. *East Texas Motor Freight, Inc.*, 497 F.2d 416 (6th Cir. 1974), the court sustained the discretion of the district court to withhold seniority relief from some discriminatees and held that the award of back pay rested within the sound discretion of the trial judge. In other cases the courts of appeals have sustained the discretion of the district courts to deny back pay as a remedy to discriminatees under Title VII. *U. S.* v. *St. Louis-San Francisco R.R. Co.*, 464 F.2d 301 (8th Cir. 1972), cert. den. 409 U.S. 1116 (1973); *U. S.* v. *N. L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1974); *Manning* v. *International Union*, 466 F.2d 812 (6th Cir. 1972), cert. den. 410 U.S. 946 (1973); *United Steelworkers of America, Local 1104* v. *U. S. Steel Corp.*, 478 F.2d 1255 (6th Cir. 1973); *LeBlanc* v. *Southern Bell Tel. & Tel. Co.*, 333 F.Supp. 602 (D.C. La. 1971), aff'd per curiam 460 F.2d 1228 (5th Cir. 1972), cert. den. 409 U.S. 990 (1972); *Kober* v. *Westinghouse Electric Corp.*, 480 F.2d 240 (3d Cir. 1973); *Rosenfeld* v. *So. Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971).

The cases cited by petitioners arising under the National Labor Relations Act do not deal with the question. Although the courts have enforced orders of the NLRB requiring reinstatement of rejected applicants with seniority, or "without prejudice to seniority", the courts did not rule upon the seniority remedy or upon the Board's discretionary power to grant or deny it. See *Atlantic Maintenance Co.* v. *N.L.R.B.*, 305 F.2d 604 (3d Cir. 1962); *N.L.R.B.* v. *Lamar Creamery Co.*, 246 F.2d 3 (5th Cir. 1957); *N.L.R.B.* v. *Cone Bros. Contracting Co.*, 317 F.2d 3 (5th Cir. 1963).

In *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 194-198 (1941), this Court, in sustaining the Board's order directing the employment of rejected applicants with back pay, acknowledged that these remedies were discretionary with the Board. The Court's statement on the latter remedy (313 U.S. at 198) is equally applicable to the seniority remedy here: "The remedy of back pay . . . is entrusted to the Board's discretion; it is not mechanically compelled by the Act. And in applying its authority over back-pay orders, the Board has not used stereotyped formulas but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations."

In *N.L.R.B.* v. *Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969), this Court reversed the Court of Appeals' modification of an NLRB back-pay order. The appellate court had eliminated back pay after a certain date because of the Board's "inordinate delay." This Court held that the Court of Appeals exceeded the narrow scope of review provided for the Board's remedial orders. Again the emphasis is upon the discretion of the Board whose position is somewhat analogous to that of a district court. In none of the

other cited cases did the Court make a ruling which touches upon the present issue.[16]

The real emphasis in all these cases is upon the discretion of the district court and the NLRB, respectively, in framing remedies for violations of Title VII and the National Labor Relations Act. That discretion was properly exercised in this case and was correctly sustained on appeal.

B. In Framing the Remedy the District Court Exercised Its Discretion Consistently with the Purposes of the Statute.

The courts in framing remedies for racial discrimination in employment have sought to accomplish either of two purposes. One purpose is to provide restitution for victims of discrimination. The other, and certainly the more important purpose, is to prevent present discrimination. See *Watkins* v. *Steelworkers, Local 2369*, 369 F.Supp. 1221 (D.C. La. 1974). The District Court's remedy in this case should be viewed in this light.

In effectuating the latter purpose, the courts have provided remedies which give preferential treatment to minority persons who themselves have not been the victims of past discrimination. These remedies, involving preferential hiring or upgrading and like relief, generally give preference to blacks as blacks and not as the victims of past discrimination. In present-day parlance under

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16. *Golden State Bottling Co.* v. *N.L.R.B.*, 38 L.Ed.2d 388 (1973), dealt with the liability of a successor employer who acquired the business after issuance of the Board's reinstatement and back-pay order. *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953), sustained the validity of a contractual provision giving pre-employment seniority credit for military service. The questions in *Aeronautical Industrial District Lodge* v. *Campbell*, 337 U.S. 521 (1949) are even more remote to present issues.

Title VII these are "race conscious" remedies. See *Morrow* v. *Crisler*, 479 F.2d 960 (5th Cir. 1973), on rehearing en banc, 491 F.2d 1053 (5th Cir. 1974), cert. den. 42 L.Ed.2d 139 (1974); *U. S.* v. *Duke*, 332 F.2d 759 (5th Cir. 1964); *U. S.* v. *Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966), aff'd en banc, 380 F.2d 385 (1967); *Local 189 United Papermakers* v. *U. S.*, 416 F.2d 980, 988 (5th Cir. 1969), cert. den. 397 U.S. 919 (1970); *Local 53 Asbestos Workers* v. *Vogler*, 407 F.2d 1047 (5th Cir. 1969).

In the present case the District Court ordered preferential hiring consideration for the class of persons consisting of rejected black applicants for road-driving positions. Similarly, preferential seniority credit was ordered for black employees seeking transfers or promotions. On remand the Fifth Circuit directed the District Court to give additional seniority credit to black employees in the latter category, and also to give additional hiring relief to blacks as blacks. In particular the Court of Appeals directed that the District Court determine on the basis of an updated record what "*Morrow* type" relief, if any, is appropriate. Although the updated record may indicate that no such relief should be granted, the Court of Appeals has required that consideration be given to the preferential hiring of black persons. The type of relief permitted under *Morrow* is a complete freeze on the hiring of whites or the establishment of a hiring ratio as between blacks and whites. Either form of relief is intended to require preference in hiring to black persons and a corresponding disadvantage to whites.

It can be seen that these remedies go somewhat beyond restitution to the victims of unlawful practices. The underlying principle is preference to members of one race to offset past discrimination against the race as a whole, and to remove the visible signs of such discrimination.

The seniority portions of the decree should be measured in terms of the decree as a whole. The petitioners sought more than restitution, and they got somewhat more. Thus, the failure of the District Court in this context to give full retroactive seniority to each black applicant hired preferentially under the decree, loses most of its significance. For this reason the remedies under Title VII likewise cannot be compared precisely to those provided under the National Labor Relations Act. Under the latter statute restitution is the controlling principle, and remedies are generally drawn to fit specifically the unfair labor practice involved. Under Title VII, and in this case, the remedy provides more than restitution in effectuating the statutory purposes.

The company does not support or attack this broad type of remedy. That question is not now involved in this case. It submits, however, that the court's failure, in its discretion, to award retroactive seniority to rejected applicants should be viewed in the context of the broad relief granted to the various classes of black persons involved, as well as to other black persons who may be the beneficiaries of preferential hiring in the future. It can hardly be said that the remedy as framed is not consistent with the purposes of Title VII.

C. The District Court's Distinction Between Individual and Class Remedies Was Proper Under Title VII.

In framing the remedy the District Court drew a distinction between the individual claimants who initiated and maintained the court action after resorting to the statutory administrative procedures before the EEOC, and the unnamed class members whose individual claims had not been submitted to the Commission or asserted in court.

The court stated that such specific, individual relief as retroactive seniority was not warranted in class actions. The court pointed out the findings that would be required in each case before a determination concerning retroactive seniority could be made, such as the existence of a vacancy, qualifications, and performance by every class member. It noted that there was no evidence upon which these multiple conclusions could be based (Pet. A54). The District Court also noted, more importantly, that the granting of this relief to class members would bypass the statutory administrative prerequisites to personal suit established by Title VII, and that the statutory emphasis on conciliation and private settlement would be thwarted (Pet. A54).

The trial court gave the exercise of discretion as an additional basis for denial of this relief to class members (Pet. A54). The court was following the reasoning which it had previously applied to similar questions in *U. S.* v. *Georgia Power Co.*, ... F.Supp. ....., 3 EPD ¶8318, pp. 7073, 7093 (D.C. Ga. 1971), aff'd in part, vacated in part, and remanded, 474 F.2d 906 (5th Cir. 1973). In the latter case it drew a distinction between the individual redress which may be given to an individual claimant after exhaustion of the administrative procedures, and the more general type of relief that may be extended to the class as a whole. Thus, the scheme of relief envisioned by Title VII would "insulate the court from inundation by a mass of detail in one suit" (3 EPD at pp. 7093-7094). *Cf. Potts* v. *Flax*, 313 F.2d 284 (5th Cir. 1963).

Even if retroactive seniority may be granted under some circumstances as a Title VII class remedy, the foregoing considerations were a proper basis for the court's exercise of discretion to deny the remedy in this case. First, the court was relying upon the burden of detail into

which it would be submerged if numerous individual claims of class members, each with individual elements of proof, could be litigated in a class action. This consideration was clearly a proper basis for the court's discretion, since the injection of the individual claims of unconsenting class members would greatly enlarge the scope of litigation, a result not necessary to the effectuation of the policies of Title VII.

Next the court noted that the adjudication of these individual claims in a class action would bypass the statutory administrative procedure with its emphasis on conciliation. The District Court was thus exercising its discretion in accordance with a clearly revealed statutory purpose. The 1964 Act reflects an intention to favor conciliation over court enforcement. This purpose permeates the framework of the statute. Title II, dealing with discrimination in public accommodations, states that after a civil action has been brought, the court may refer the matter to the Community Relations Service as long as the court believes there is a reasonable possibility of obtaining voluntary compliance. 42 U.S.C. §2000a-3(d). Title IV, concerning the desegregation of public education, precludes the attorney general from filing suit until the school board has had a reasonable time to correct any discriminatory practice. 42 U.S.C. §2000c-6. Title VI, affecting discrimination in federally assisted programs, prohibits discontinuation of federal funding until it is determined that a discriminatory practice cannot be terminated by voluntary means. 42 U.S.C. §2000d-1. Title X establishes a Community Relations Service to assist in resolving disputes by conference and conciliation. 42 U.S.C. §2000g-1.

The legislative history of Title VII reflects a congressional intention that suit would be brought only if a settlement could not be achieved through conciliation. For

example, a provision of the House bill which would have allowed a civil action to be brought in advance of conciliation, was deleted "to make certain that there will be a resort by the Commission to conciliatory efforts before it resorts to a court for enforcement." 110 Cong. Rec. 2566 (Remarks by Rep. Celler). As the Fifth Circuit has stated: "It is not to be doubted that Congress did intend that where possible these controversies should be settled by conciliation rather than by litigation. The statute ought to be so administered." *Dent* v. *St. Louis-San Francisco R.R. Co.*, 406 F.2d 399, 403 (5th Cir. 1969). It is noteworthy that the 1972 amendments provide that the EEOC must pursue efforts to eliminate the alleged unlawful employment practice by conference, conciliation, and persuasion, before bringing action in court. 42 U.S.C. §2000e-5 (f)(1); see *E.E.O.C.* v. *Container Corp. of America*, 5 FEP Cases 108 (D.C. Fla. 1972). When this action arose the EEOC was successfully conciliating about 38 percent of the charges it attempted to conciliate. EEOC Fifth Annual Report (1970), p. 63. The District Court was thus seeking to promote the congressional purpose of securing the adjustment of employment discrimination cases through the conciliation procedures of the Commission. This purpose was clearly a proper basis for the exercise of the court's discretion.

The court's refusal to entertain and determine the individual claims for retroactive seniority was a proper exercise of its discretion to control the scope of a class action authorized under Rule 23(b)(2) of the Federal Rules of Civil Procedure (Pet. A53).[17] Under Rule 23(c)(4) the District Court had a broad discretion in determin-

17. There was no certification of the class action before trial. The authorization of the action under Rule 23(b)(2) appears in the conclusions of law (Pet. A53), and the classes are defined in the decree (Pet. A66-A67).

ing and limiting the issues to be included in the class action.[18] The distinction drawn by the District Court between individual relief and class relief follows Rule 23(b)(2), which expressly contemplates "injunctive relief or corresponding declaratory relief with respect to the class as a whole." Since the seniority claims require individual determination on the basis of differing facts in each case, the court exercised its discretion to limit the class action and the class remedy to relief which may be granted generally to the class as a whole.

The Fifth Circuit did not fully accept the distinction drawn by the District Court between individual and class relief; it reversed the holding, on this basis, that back pay was not "warranted" as a remedy in a 23(b)(2) class action, and remanded this issue for reconsideration (Pet. A40). However, this distinction was still a proper consideration in the District Court's exercise of its dual discretion to determine the equitable relief to be included in the remedy, and to determine the scope of the class action. On the seniority question the District Court's discretion was sustained on appeal.

There is a dearth of circuit court authority for the granting of this remedy to unnamed class members. In *Jurinko* v. *Edwin L. Wiegand Co.*,[19] 477 F.2d 1038 (3d Cir.

18. See 3B Moore's Federal Practice (2d ed.), ¶23.65, p. 23-1251; *Nix* v. *Grand Lodge*, 479 F.2d 382 (5th Cir. 1973), cert. denied 414 U.S. 1024 (1973), Pet. for Rehearing denied 414 U.S. 1138 (1974); *Stern* v. *Lucy Webb Hayes Nat. Training School*, 17 F.R. Serv. 2d 1573 (D.C. D.C. 1973); *Abercrombie* v. *Lum's, Inc.*, 345 F.Supp. 387 (D.C. Fla. 1972).

19. The effect of section 703(h) was not discussed in this decision. The same court has subsequently expressed approval of the Fifth Circuit's view concerning section 703(h) as a bar to "fictional" seniority. *Jersey Central Power & Light Co.* v. *Local Union 327*, 508 F.2d 687, 706 (3d Cir. 1975). This construction was also approved in *Waters* v. *Wisconsin Steel Works of International Harvester Co.*, 502 F.2d 1309, 1317-1320 (7th Cir. 1974).

1973), vacated and remanded on other grounds, 414 U.S. 970 (1973), relied upon by petitioners as a decision in conflict with the holding below, the court was dealing only with individual relief. In *Meadows* v. *Ford Motor Co.*, supra, involving a class action, the question was remanded, although the court did hold that there is no prohibition in the statute upon the grant of retroactive seniority.

CONCLUSION

This respondent submits that the District Court properly exercised its discretion to deny retroactive seniority to class members. The court's discretion as exercised was consistent with the purposes of Title VII and was therefore entitled to be sustained on appeal. The Court of Appeals correctly held that the District Court did not abuse its discretion in withholding this remedy. Therefore the judgment of the Fifth Circuit should be affirmed.

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IN THE

Supreme Court of the United States

October Term, 1974

HAROLD FRANKS AND JOHNNIE LEE, *Petitioners*,
v.
BOWMAN TRANSPORTATION COMPANY, INC., *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT UNITED STEELWORKERS OF AMERICA, AFL-CIO, AND FOR AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, AS AMICUS CURIAE

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-728

HAROLD FRANKS AND JOHNNIE LEE, *Petitioners*,
v.
BOWMAN TRANSPORTATION COMPANY, INC., *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT UNITED STEELWORKERS OF AMERICA, AFL-CIO, AND FOR AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, AS AMICUS CURIAE

This brief is filed jointly by respondent United Steelworkers of America, AFL-CIO (hereinafter referred to as "USWA"), and by American Federation of Labor and Congress of Industrial Organizations, as *amicus curiae* (hereinafter referred to as "AFL-CIO").[1]

USWA, which is the AFL-CIO's largest affiliate, is the collective bargaining representative of the employees of respondent Bowman Transportation Company (hereinafter "the Company"). AFL-CIO is a federation of 111 labor

[1] USWA and AFL-CIO file this statement of their common position in a single brief for the convenience of the Court. All parties have furnished written consent to AFL-CIO to file an *amicus curiae* brief.

organizations, with a combined membership of 14 million.

Both AFL-CIO and USWA actively supported the enactment of Title VII of the Civil Rights Act of 1964. President Meany, testifying in support of its passage, declared:

> "The leadership of the AFL-CIO, and of the separate federations before merger, has been working ceaselessly to eliminate those prejudices. The leaders of every affiliated national and international union are enlisted in the same effort. We have come a long way in the last 20 years—a long way farther, I might say, than any comparable organization, including the religious organizations as a whole, and certainly we are a generation or more ahead of the employers as a whole.
>
> "But we have said repeatedly that to finish the job we need the help of the U.S. Government. • • • When the rank-and-file membership of a local union obstinately exercises its right to be wrong, there is very little we in the leadership can do about it, unaided. • • •
>
> "In short, I am not here to ask for special exemptions for unions; quite the contrary. I hope the law you draft will cover the whole range we ourselves have written into our constitution and we hope you will make sure that the law will also apply to apprenticeship programs of every kind, as I urged this very committee last August."[2]

Both USWA and AFL-CIO have labored diligently to bring employment practices throughout American industry into compliance with Title VII, and to secure judicial interpretations which effectuate Title VII's statutory objectives.[3]

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[2] EEOC, Legislative History of Titles VII and XI of the Civil Rights Act of 1964 [hereinafter "Leg. Hist."] pp. 2158-59. The President of USWA had likewise testified in support of enactment of Title VII. *Id.* 3242. See also Bayard Rustin, the Blacks and the Unions, Harper's Magazine, May, 1971, pp. 73, 76.

[3] For example, USWA filed a brief *amicus curiae* in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, urging the statutory interpretation which this Court adopted, and USWA initiated the negotiations leading to the industry-wide decree bringing employment practices in the steel industry into compliance with recent judicial interpretations of Title VII. See *U.S.* v. *Allegheny Ludlum Industries,* 8 FEP Cases 198, 63 F.R.D. 1 (N.D. Ala., 1974). USWA's role in integrating the two largest southern steel plants, prior to passage of Title VII, is recounted in *U.S.* v. *United States Steel Corp.*, 371 F. Supp. 1045, 1055 and particularly n. 23 thereat, 1060 n. 39, 1062 (N.D. Ala. 1973), and *Whitfield* v. *United Steelworkers,* 263 F.2d 546 (5th Cir. 1959).

ADDITIONAL STATUTORY PROVISION INVOLVED

We believe that another provision of Title VII of the Civil Rights Act of 1964, not reproduced in the brief for petitioners, is important to the analysis of this case. Section 703(j), 42 U.S.C. § 2000e-2(j) provides:

> "(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

COUNTER-STATEMENT OF THE CASE

We accept petitioners' statement of the case, but believe

the Court should have additional information respecting the role of the Union.

Until 1967, the Company's employees were unorganized. International Union of District 50 (hereinafter "District 50") had sought to organize the employees previously, but had been rejected in an NLRB-conducted election (43a). The employment conditions which prevailed during this non-union period were aptly described in the decision of the court below: the Company had "followed a conscious policy of keeping its employees segregated according to race," had "prohibited inter-departmental transfers flatly," and had discriminated against some blacks in hiring, 495 F.2d at 409-411.[4]

In 1967, District 50 succeeded in organizing the employees, was recognized by the Company as their bargaining representative, and commenced negotiations with the Company for a first collective bargaining agreement (43a). In accordance with its long-standing policy that "company-wide seniority is the only true seniority," District 50 proposed that the Company convert its seniority system from departmental seniority to company-wide seniority, that all job vacancies be posted, that transfers be allowed on the basis of plant seniority, and that the Company henceforth assign newly-hired employees to all departments "without regard to race" (44a; 495 F.2d at 410-411). The Company agreed to abolish its no-transfer policy, and to assign new employees without regard to race. (495 F.2d at 410-411). The Company refused, however, to substitute company-wide seniority for departmental seniority, or to post notices of job vacancies (44a-45a). District 50, convinced that it

[4] The Company was willing to hire blacks who would accept assignment to the historically "black" jobs, but refused to hire those whose sole interest was in "white" jobs. *Id.* at 411.

could not conduct a successful strike, acquiesced in an agreement which preserved the departmental seniority system and did not provide for posting of job vacancies (44a; 495 F.2d at 410-411).

The 1967 agreement provided for a reopener, without the right to strike, in 1968. In the negotiations pursuant to that reopener, District 50 again demanded company-wide seniority and posting (45a). This time, the Company agreed to the posting of job vacancies, but it again refused to convert to company-wide seniority (45a).

The Company had exclusive authority in determining who would be hired (45a). The Company continued to discriminate against blacks in hiring until 1972. 495 F.2d at 411.

In 1972, District 50 merged with USWA. Accordingly, USWA has succeeded District 50 as the employee's bargaining representative, and as the union-respondent in this case.

This suit sought relief for two groups of workers: blacks who were hired when they first applied but who were assigned discriminatorily to jobs in the Company's less desirable departments, and blacks who were discriminatorily denied employment altogether when they first applied.

The decision of the court below granted the first group—those discriminatorily assigned—all of the relief they sought. The court held that these employees were entitled not only to back pay, but also to the right which District 50 had sought unsuccessfully in negotiations: to transfer to other departments with "the use of full company seniority for transfer purposes . . . and for all purposes after transfer in the new department" (495 F.2d at 416). The Company's petition for certiorari from this portion of the

decision below was denied, 43 L.W. 3330 (1974).

The decision below did not, however, fully cure the discrimination visited upon those who had initially been rejected for employment solely because of their race. While the decision accorded these employees back pay for the period during which employment had been discriminatorily withheld, it denied their request that they be awarded the earlier seniority dates which they would have enjoyed absent discrimination. *Id.* at 417-418. We agree with petitioners, and demonstrate herein, that the court below erred in not granting the seniority relief requested.

ARGUMENT

Introduction and Summary

It is often said that hard cases make bad law. But easy cases can also make bad law, if the apparent correctness of a particular result deflects attention from the importance of the path by which that result is reached. Mr. Justice Jackson once made the point with characteristic grace in a concurring opinion:

> "I part company with the Court as to the road we will travel to reach a destination where all agree we will stop, at least for the night. But sometimes the path that we are beating out by our travel is more important to the future wayfarer than the place in which we choose to lodge."[5]

We agree with petitioners that they are entitled to the seniority relief which they seek. We believe, however, that petitioners have arrived at the correct result through an analysis of Title VII which is incomplete, in that it does not focus upon the basic objectives which guided Congress in structuring that statute.

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[5] *First National Bank of Chicago* v. *United Airlines*, 342 U.S. 396, 398 (1952).

As we will develop herein, Congress had two very clear objectives: (1) to forbid discrimination and to make whole those who suffered discrimination; (2) not to confer preferential rights upon minorities, either in the substantive or remedial provisions of the Act.

In our view, these two objectives lead to a dichotomy between "make whole" remedies, which fully implement the Congressional design, and "preferential" remedies, which Congress clearly intended to forbid. In the seniority context, there are two types of remedies which would be "preferential": (1) conferring enhanced seniority upon individuals who are not discriminatees, i.e., who have not been denied employment or perquisites of employment by the defendants on account of race, creed, color, sex or national origin; and (2) conferring seniority rights upon discriminatees beyond those necessary to place them in the positions they would be occupying had there been no discrimination.

Petitioners are entitled to the relief they seek because that relief is "make whole," not "preferential." Were this Court to reverse the decision below, however, without recognizing the "cutting line" drawn by Congress, its opinion might suggest that other cases be decided in a manner inconsistent with the Congressionally intended scheme. This concern is not hypothetical, for there is already on this Court's docket a case (*Waters* v. *Wisconsin Steel Works*, No. 74-1064, petition for certiorari pending) in which a "preferential" remedy is sought, but which counsel for the *Waters* petitioners (who are also counsel for petitioners here) assert poses "the same" issue in substance as that in the instant case.[6]

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[6] Reply Brief in Support of Certiorari in *Waters*, p. 1. The perti-

We begin by analyzing the relevant legislative materials and showing that they demonstrate that the dichotomy just noted is an accurate distillation of the Congressional intent. We then draw the lessons which Title VII, read against the background of its history, provides for this case, and for cases such as *Waters*.

I. The "Rightful Place" Remedy Sought By Petitioners Is Called for By the Congressional Scheme

A. The Congressional Policies which Bear Upon the Fashioning of "Seniority" Remedies under Title VII

The basic principles governing the fashioning of relief for Title VII violations were articulated by this Court in *Albemarle Paper Co.* v. *Moody*, 43 L.W. 4880 (June 25, 1975). *Albemarle* involved the remedy of back pay, but the sentence of § 706(g) which the Court there construed authorizes back pay and other equitable relief in the same terms.[7] As this Court made clear in *Albemarle*, the discretion vested in district courts by § 706(g) must be exer-

nent paragraph, in full, states:

> "As respondents properly recognize, the certworthiness of Questions 1 and 2 involves the relationship of the Seventh Circuit decision in the instant case to the Fifth Circuit decision in *Franks* v. *Bowman Transportation Co.*, 495 F.2d 398 (5th Cir., 1974), cert. granted 43 U.S.L.W. 3515 (1975), No. 74-728. Both the Fifth and Seventh Circuits held that "last hired, first fired" seniority systems were immune *per se* from legal attack. The Fifth Circuit reached this result by holding that it lacked the power to give an aggrieved employee the necessary relief, seniority retroactive to the date on which he was denied a job because of his race. The Seventh Circuit reached this result by holding that such a seniority system was, *as a matter of law*, non-discriminatory. The substance of the Fifth and Seventh Circuit rules is of course the same."

[7] Section 706(g), first sentence, provides:

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate."

cised consistently with "the purposes which inform Title VII" (43 L.W. at 4883-84). The essential first step in resolving this case is, therefore, to identify those Congressional objectives which bear upon the formulation of "seniority" remedies.

The court below held that § 703(h) precludes awarding seniority to a discriminatee for any period prior to his actual date of hire. Respectfully, we submit that because the court below failed to focus on the broad design of Title VII, it construed that one section out of context and imported to it a meaning quite different from that intended by Congress. As we show, the central concern which preoccupied Congress in drafting Title VII was to be sure that it had made sufficiently plain the line between abolishing discrimination, which was its goal, and providing preferential treatment, which all members wished to preclude. The debate on the floor of Congress was not over whether that line should be drawn—everyone agreed that it should—but over what language was necessary to make that line unmistakably clear. Section 703(h) is but one of several provisions added to confirm this Congressional purpose. Properly construed, it precludes only "preferential" treatment. It does not preclude any remedy which—as we later show is involved here—merely accords a proven vic-

tim of discrimination his "rightful place": the place in the seniority system which he would be occupying but for the prior discrimination against him.

The drafters of the original bill which eventuated in Title VII sought to make explicit that remedies would be available only to those who established that they were victims of discrimination. The basic liability provisions, §§ 703(a), (c), speak of discrimination "against any individual," and the key remedial provision, § 706(g), states in its last sentence that courts may not furnish remedies to "an individual" unless he has proven that he has suffered employment disadvantage "on account of race, color, religion, sex or national origin."[7a] The drafters believed

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[7a] Section 703(a) provides:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 703(c) provides:

> It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership, or applicants for membership or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

The last sentence of Section 706(g) provides:

> No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a). [Section 704(a) forbids retaliation against employees for asserting their rights under Title VII].

that these provisions, standing alone, made clear the dual Congressional objectives: on the one hand, to forbid discrimination and make discriminatees whole; on the other, to preclude preferential treatment of minorities *qua* minorities. As Senators Clark and Case, the floor managers of Title VII in the Senate, explained:

> "No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not discriminated against in violation of this title. This is stated expressly in the last sentence of section 707(c) [enacted as 706(g)] which makes clear what is implicit throughout the whole title; that employers may hire and fire, promote and refuse to promote for any reason, good or bad, provided only that individuals may not be discriminated against because of race, color, religion, sex or national origin."
>
> • • • •

> "There is no requirement in title VII that an employer maintain a racial balance in his work force. * * * It must be emphasized that discrimination is prohibited as to any individual. While the presence or absence of other members of the same minority group in the work force may be a relevant factor in determining whether in a given case a decision to hire or to refuse to hire was based on race, color, etc., it is only one factor, and the question in each case would be whether that individual was discriminated against."[8]

But notwithstanding the clarity of the bill's original language, there developed a national tide of concern that Title VII would confer preferential rights upon minorities at the expense of the majority. Two basic fears were voiced again and again: that Title VII would force employers to hire minorities pursuant to quotas in order to achieve racial balance, and that minorities when hired would be given special seniority rights boosting them ahead of incumbent whites.

The alarums were first sounded in the Minority Report accompanying the House Judiciary Committee's Report recommending adoption of Title VII. The minority members asserted that the bill "under the cloak of protecting the civil rights of certain minorities, will destroy civil rights of all citizens of the United States who fall within its scope."[9] They listed a number of interests which would be "seriously impair[ed] by the passage of the bill."[10] Among these were the "seniority rights of employees in corporate and other employment."[11] They warned that

[8] Leg. Hist. 3044, 3040.

[9] Leg. Hist. 2064.

[10] *Ibid.*

[11] *Id.*, 2065.

Title VII "would destroy seniority."[12] They asserted that the bill's "true interest and purpose" was to achieve racial balance, not merely to end discrimination.[13] Dramatizing the threat to seniority which they perceived, the minority members declared:

> "*The provisions of this act grant the power to destroy union seniority.* The action of the Secretary of Labor already mentioned is merely the beginning, if this legislation is adopted. With the full statutory powers granted by this bill, *the extent of actions which would be taken to destroy the seniority system is unknown and unknowable.*
>
> "To disturb this traditional practice is to destroy a vital part of unionism. Under the power granted in this bill, if a carpenters' hiring hall, say, had 20 men awaiting call, the first 10 in seniority being white carpenters, the union could be forced to pass them over in favor of carpenters beneath them in seniority, but of the stipulated race. And if the union roster did not contain the names of the carpenters of the race needed to 'racially balance' the job, the union agent must then go into the street and recruit members of the stipulated race in sufficient number to comply with Federal orders, else his local could be held in violation of Federal law.
>
> "Neither competence nor experience is the key for employment under this bill. Race is the principal, first, criterion."[14]

These accusations prompted a number of the bill's sponsors in the House to submit a statement of "additional views," in which they sought to allay the fears which the minority members had voiced:

[12] *Id.*, 2066.

[13] *Id.*, 2067-68.

[14] *Id.* 2071 (emphasis in original).

"It must also be stressed that the Commission must confine its activities to correcting abuse, not promoting equality with mathematical certainty. In this regard, nothing in the title permits a person to demand employment. Of greater importance, the Commission will only jeopardize its continued existence if it seeks to impose forced racial balance upon employers or labor unions. Similarly, management prerogatives, and union freedoms are to be left undisturbed to the greatest extent possible. Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices. Its primary task is to make certain that the channels of employment are open to persons regardless of their race and that jobs in companies or membership in unions are strictly filled on the basis of qualification." [15]

The sponsors' reassurances proved sufficient in the House, which passed the bill without material change. But in the Senate a filibuster began on March 9, 1964 and continued for more than three months.[16] That filibuster fed on the fear that Title VII was intended "to rob all Americans of important rights for the benefit of a segment of the population." [17] The emotional climate was accurately depicted by Senator Clark, one of the floor managers of Title VII:

> "There has been so much oratory, and so many really extravagant statements have been made about what Title VII does, that it is perhaps difficult to speak objectively and carefully about what the title is intended to do, without being diverted into an effort to rebut some of what can only be called fantastic misstatements about what the title does, which have been made from time to time, not only on the floor of the Senate but also by a large number of individuals serving in the press corps, without their having taken the trouble to read the title or being quite careless in what they had to say about it." [18]

[15] *Id.* 2150.

[16] *Id.* 3092.

[17] *Id.* 3092.

As the filibuster entered its second month, Title VII's sponsors submitted three written explanations of the bill designed specifically to quiet the fears that Title VII would require racial quotas and grant special seniority rights to minorities. Senators Clark and Case, the floor managers, submitted an interpretative memorandum addressed to these fears. They explained that Title VII did not mandate racial balance, indeed it forbade "any deliberate attempt to maintain a racial balance":

> "There is no requirement in Title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of Title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race. * * *" [19]

With respect to the fears concerning seniority, the memorandum declared:

> "Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them

[18] *Id.* 3092.

[19] *Id.* 3040.

special seniority rights at the expense of the white workers hired earlier. (However, where waiting lists for employment or training are, prior to the effective date of the title, maintained on a discriminatory basis, the use of such lists after the title takes effect may be held an unlawful subterfuge to accomplish discrimination.)" [20]

Senator Clark also introduced a statement prepared by the Department of Justice "in rebuttal to the argument made by the Senator from Alabama [Mr. Hill] to the effect that Title VII would undermine the vested rights of seniority * * * and that Title VII would impose the requirement of racial balance." [21] The Department of Justice memorandum stated:

"First, it has been asserted that title VII would undermine vested rights of seniority. This is not correct. Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. Title VII is directed at discriimnation based on race, color, religion, sex, or national origin. It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is 'low man on the totem pole' he is not being discriminated against because of his race. Of course, if the seniority rule itself is discriminatory, it would be unlawful under title VII. If a rule were to state that all Negroes must be laid off before any white man, such a rule could not serve as

[20] *Ibid.*

[21] *Id.* 3244.

the basis for a discharge subsequent to the effective date of the title. I do not know how anyone could quarrel with such a result. But, in the ordinary case, assuming that seniority rights were built up over a period of time during which Negroes were not hired, these rights would not be set aside by the taking effect of title VII. Employers and labor organizations would simply be under a duty not to discriminate against Negroes because of their race. Any differences in treatment based on established seniority rights would not be based on race and would not be forbidden by the title.

* * * *

"Finally, it has been asserted that title VII would impose a requirement for 'racial balance.' This is incorrect. There is no provision, either in title VII or in any other part of this bill, that requires or authorizes any Federal agency or Federal court to require preferential treatment for any individual or treatment for any individual or any group for the purpose of achieving racial balance. No employer is required to hire an individual because that individual is a Negro. No employer is required to maintain any ratio of Negroes to whites, Jews to gentiles, Italians to English, or women to men. The same is true of labor organizations. On the contrary, any deliberate attempt to maintain a given balance would almost certainly run afoul of title VII because it would involve a failure or refusal to hire some individual because of his race, color, religion, sex, or national origin. What title VII seeks to accomplish, what the civil rights bill seeks to accomplish is equal treatment for all." [22]

Finally, Senator Clark submitted a series of written answers to questions which had been proffered by Senator Dirksen as to the meaning of the bill. With respect to

[22] *Id.* 3244-45.

seniority the pertinent question and answer were as follows:

> "Question. Would the same situation prevail in respect to promotions, when that management function is governed by a labor contract calling for promotions on the basis of seniority? What of dismissals? Normally, labor contracts call for 'last hired, first fired.' If the last hired are Negroes, is the employer discriminating if his contract requires they be first fired and the remaining employees are white?
>
> "Answer. Seniority rights are in no way affected by the bill. If under a 'last hired, first fired' agreement a Negro happens to be the 'last hired,' he can still be 'first fired' as long as it is done because of his status as 'last hired' and not because of his race." [23]

With respect to the concern that the "bill would require employers to establish quotas for nonwhites in proportion to the percentage of nonwhites in the labor market area," Senator Clark responded: "Quotas are themselves discriminatory." [24]

Despite these efforts to set fear at rest, it became necessary, in order to secure sufficient votes to end the filibuster, to include express language dealing with the subjects of racial balance and seniority (the present §§ 703(j) and (h)) as part of the package of amendments known as the Mansfield-Dirksen compromise. Senator Humphrey explained the sponsors' reason for accepting § 703(j):

> "* * * A new subsection 703(j) is added to deal with the problem of racial balance among employees. The proponents of this bill have carefully stated on numerous occasions that title VII does not require an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group. Since doubts have persisted, subsection (j) is added to state this point expressly. This subsection does not represent any change in the substance of the title. It does state clearly and accurately what we have maintained all along about the bill's intent and meaning." [25]

[23] *Id.* 3013.

[24] *Id.* 3015.

Section 703(h), Senator Humphrey declared, served the same purpose with respect to the fears which had been advanced concerning seniority:

> "A new subsection 703(h) has been added, providing that it is not an unlawful employment practice for an employer to maintain different terms, conditions, or privileges of employment either in different locations or pursuant to a seniority, merit, or other incentive system, provided the differences are not the result of an intention to discriminate on grounds of race, religion, or national origin. * * * [This] change does not narrow application of the title, but merely clarifies its present intent and effect." [26]

Even after these changes had been approved, Senator Ervin moved to strike Title VII from the Civil Rights Act on the ground that it unconstitutionally deprived white employees of equal protection. Senator Clark responded:

> "Mr. President, this title would not deprive anyone of any rights. All it does is to say that no American, individual, labor union, or corporation, has the right to deny any other American the very basic civil right of equal job opportunity.
>
> "The bill does not make anyone higher than anyone else. It establishes no quotas. It leaves an employer free to select whomever he wishes to employ. It enables a labor union to admit anyone it wishes to take in. It

[25] *Id.* 3005.

[26] *Ibid.*

tells an employment agency that it can get a job for anyone for whom it wishes to get a job.

"All this is subject to one qualification, and that qualification is to state: 'In your activity as an employer, as a labor union, as an employment agency, you must not discriminate because of the color of a man's skin. You may not discriminate on the basis of race, color, religion, national origin, or sex.'

"That is all this provision does. It would establish a legislative civil right for what has always been a sacred American constitutional right, the right to equal protection of the laws. That phrase does not come from the commerce clause, but the philosophy behind it is the philosophy behind the fair employment practice title.

"It merely says, 'When you deal in interstate commerce, you must not discriminate on the basis of race, religion, color, national origin, or sex.'

> "Title VII as it presently exists, and as modified—as many of us agreed, reluctantly, including myself, that it should be modified by the Dirksen amendment—is one of the mildest Fair Employment Practices acts ever to be brought before the Congress." [27]

The legislative history thus confirms that while Congress wanted the proven victims of discrimination to be made whole, it did not want anyone to receive preferential treatment. "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971). That is what the original substantive (§§ 703(a), (c)) and remedial (§ 706(g)) provisions of Title VII declared. That is what the legislation's sponsors stated again and again throughout the debates. Sections 703(h) and (j) were added—at the insistence of those whose votes were

[27] *Ibid.*, 3092.

necessary to break the filibuster and enable passage of the bill—merely to make doubly sure that the statute could not be subject to any other construction.

In the next section, we will show that the statute, properly construed, entitles petitioners to the remedy they seek. We pause first, however, to observe that there are two aspects of petitioners' analysis of the legislative history with which we disagree.

First, petitioners urge (brief, pp. 28-30) that the legislative interpretations proffered by Senators Clark and Case in an effort to quiet the fears that Title VII would accord preferential rights should be disregarded. In petitioners' view, these statements are not evidence of "the legislative purpose" because they were made "weeks before § 703(h) was conceived." The contention that the interpretations of a bill submitted in writing by its floor managers should be disregarded would in any context be a startling one. In the context of the debate over Title VII it is absurd. Here, as in *Pipefitters* v. *United States*, 407 U.S. 385 (1972), sponsors struggling to secure a necessary 2/3 majority sought to reassure colleagues of their bill's limited reach.[28] This Court recognized that sponsors' explanations of their bill's meaning, which are "entitled in any event to great weight, [are] in this instance controlling." *Id.* at 409. Moreover, the legislative history of Title VII, recounted above, shows clearly the significance of the Clark-Case materials. They explained the bill's meaning before §§ 703(h) and (j) were added, and as Senator Humphrey explained, the latter provisions merely reiterated "what we have maintained all along about the bill's intent and meaning." Leg. Hist. 3005.

[28] In *Pipefitters*, a 2/3 majority was needed "to overrule a predictable veto" of the Taft-Hartley Act. Here, a 2/3 majority was required to terminate an ongoing filibuster.

This Court's analysis of the legislative history in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 434-436 (1971), confirms, albeit in another context, that the Clark-Case materials constitute authoritative evidence of Congressional intent. The Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae (p. 18) likewise recognizes these materials to be authoritative.

Second, petitioners contend that § 703(h) applies only to the question whether a violation has occurred, and not to the question of what remedies may be provided once violations have independently been found. It is difficult to perceive what benefit petitioners would derive from this distinction, since there is an express prohibition of preferential remedies contained in the last sentence of § 706(g), the bill's remedial provision. In any event the distinction is unsound. While it is true that § 703(h), read literally, talks only in terms of violation, the legislative debates, as shown above, make clear that the considerations which eventuated in the addition of that section encompassed concern for the scope of remedy as well as for the definition of violation. On this point, this case is analytically indistinguishable from *Porter Co.* v. *NLRB*, 397 U.S. 99 (1970). The Court dealt there with the relationship between § 8(d) of the NLRA, which states that an employer does not violate his duty to bargain by refusing to agree to a union proposal, and § 10(c), which empowers the NLRB to provide such affirmative remedies against violators "as will effectuate the purposes of the Act." The Court of Appeals, noting that § 8(d) is phrased in terms of violation, held that it did not preclude the Board from directing an employer to agree to a union proposal as a remedy for violations independently found. This Court rejected the attempted distinction, noting that "the same considerations

that led Congress" to prohibit findings of violations on that basis likewise dictated that that result not be accomplished through remedy-formulation:

> "In reaching this conclusion the Court of Appeals held that § 8(d) did not forbid the Board from compelling agreement. That court felt that "[s]ection 8(d) defines collective bargaining and relates to a determination of *whether* a . . . violation has occurred and not to the *scope* of the remedy which may be necessary to cure violations which have already occurred." 128 U.S. App. D. C., at 348, 389 F.2d, at 299. We may agree with the Court of Appeals that as a matter of strict, literal interpretation that section refers only to deciding when a violation has occurred, but we do not agree that that observation justifies the conclusion that the remedial powers of the Board are not also limited by the same considerations that led Congress to enact § 8(d). It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties. It would be anomalous indeed to hold that while § 8(d) prohibits the Board from relying on a refusal to agree as the sole evidence of bad-faith bargaining, the Act permits the Board to compel agreement in that same dispute." [20]

The *Porter* analysis is particularly apposite, for § 10(c), there construed, was the model for Title VII's remedial provision, § 706(g). *Albemarle*, 43 L.W. at 4884-85. Thus, while § 703(h) literally talks in terms of whether a violation has occurred, it expresses a Congressional policy which precludes the fashioning of remedies inconsistent with its underlying purpose.

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[20] 397 U.S. at 107-108 (emphasis in original).

B. The Relief Sought by Petitioners is Fully Consistent with, and Effectuates, the Congressional Objectives.

This case involves employees who were originally denied employment because of their race. The court below has furnished them a portion of the relief necessary to make them whole for the discrimination they suffered: it has ordered that they receive backpay for the period during which they were unlawfully denied employment. While that remedy compensates the employees for the period prior to their obtaining employment, it does not make them whole for the period thereafter.

If an employee who was discriminatorily denied employment in 1970, and who instead was hired in 1972, is accorded a 1972 seniority date, his employment career in many respects will be inferior to that which he would have enjoyed had he been hired in 1970. Seniority serves many functions in the industrial setting, and a reduced seniority standing disadvantages an employee as to each.

1. *Seniority as a measure of fringe benefit entitlement.* Although seniority is most often thought of as a means of resolving competition between employees, it serves important non-competitive functions as well. In order to earn a pension an employee must accumulate a designated number of years of service with his employer. The number of weeks of vacation which he will receive almost always increases as his seniority increases. Entitlement to other fringe benefits, such as insurance and supplemental unemployment benefits, may not take effect until he has accumulated a specified amount of seniority. An employee who is accorded a 1972 seniority date will not enjoy these benefits as fully as if he had been hired in 1970 with a 1970 seniority date.

2. ***Protection in layoff situations.*** When it becomes necessary to reduce a workforce, the nearly universal practice in American industry is to lay off employees in inverse order of their seniority. When it later becomes necessary to increase the workforce, employees are recalled from layoff in the order of their seniority. The denial of two years' seniority may spell the difference between an employee remaining continuously at work or suffering months or years of layoff.

3. *Promotional opportunities.* In most industrial settings, seniority determines which of several qualified employees will be awarded a promotional opportunity, and conversely which will be able to retain a preferred job when it is necessary that some be reduced to lower-paying jobs. The employee who is denied two years' seniority will wait longer to secure promotions, and will be "bumped" more quickly to lower-paying jobs during periods of reduced employment.

4. *Seniority for other competitive purposes.* Seniority is also used to resolve other forms of employee competition. It is often used, for example, to determine which employees may take their vacations in the more desirable months, which employees will work the day shift rather than the night shift, and which employees will have first opportunity to perform overtime work (or, for that matter, which will have the right to refuse overtime work). In industries such as air, rail and trucking, seniority is also used to determine which employees will have the most attractive "runs." It is self-evident that in all of these respects, the denial of two years' seniority may substantially affect the work opportunities and life-style available to an employee.

The only way a discriminatee can be made whole is to give him the seniority date he would have had but for the

refusal to hire him. That "rightful place" remedy not only effectuates Congress' desire that discriminatees be made whole, it also preserves the integrity of seniority systems. Unions and employees have favored seniority as the determinant of employee competition because it furnishes an objective and equitable basis for allocating employment opportunities. But the system remains equitable only if all employees are given their proper seniority measure. Equity does not exist if some employees have had their seniority artifically reduced by the employer's discriminatory behavior. Reflecting this reality, the "rightful place" remedy has long been deemed an implicit part of collectively bargained seniority. When employees are discharged in violation of contract, unions invariably demand that they be reinstated without interruption of seniority, and arbitrators invariably grant that remedy.[30]

The correctness of this result in Title VII cases is further confirmed by the decisions under § 10(c), the remedy provision of the NLRA, upon which Title VII's remedial provision "was expressly modeled." *Albemarle*, 43 L.W. at 4884. The Board invariably awards "rightful place" seniority to applicants discriminatorily denied employment. In *Phelps Dodge Corp* v. *NLRB*, 313 U.S. 177 (1941), this Court affirmed an NLRB order requir-

[30] "An employee who is discharged but later reinstated through the grievance procedure . . . is to have the work days he lost applied to his seniority." *P.M. Northwest Co.*, 42 L.A. 961, 964 (Daniel Lyons, 1964). See also, *Jordanos Markets, Inc.*, 63 LA 345, 350 (Marshall Ross, 1974) ("full seniority"); *BASF Wyandotte Corp.*, 63 LA 121, 126 (Elliot Beitner, 1974) ("with full seniority"); *Inland Lumber Co.*, 62 LA 1151, 1154 (Henry C. Wilmoth, 1974) ("without loss of seniority"); *North American Rockwell Corp.*, 62 LA 901, 909 (Martin E. Conway, 1974) ("with complete seniority"); *Amoco Oil Co.*, 61 LA 10, 14 (Bernard Cushman, 1973) ("with seniority rights unimpaired").

ing that applicants who had been discriminatorily denied employment be awarded jobs "without prejudice to their seniority or other rights and privileges." 19 NLRB 547, 600 (1940). In explaining why the Board had power to order "reinstatement" of rejected applicants, this Court declared: "Experience having demonstrated that discrimination in hiring is twin to discrimination in firing, it would indeed be surprising if Congress gave a remedy for the one which it denied for the other." *Id.* at 187.

In *Nevada Consolidated Copper Corp.*, 26 NLRB 1182, 1231 (1940), enforced, 316 U.S. 105 (1942), the Board made more explicit the remedy to which discriminatorily rejected applicants were entitled: "the same or substantially equivalent positions at which they would have been employed, including any seniority or other rights or privileges they would have acquired had the respondent not unlawfully discriminated against them."[31]

We have shown thus far that Title VII does not *preclude* awards of seniority which put discriminatees in their rightful place. A related question is to what extent the district courts retain *discretion* to withhold the remedy on the basis of countervailing considerations in particular cases. Here, too, as *Albemarle* explained, the NLRA provides important guidance, for we "may assume that Congress was aware that the Board, since its inception, has

[31] See also *Consolidated Dairy Products*, 194 NLRB 701 (1971); *W.B.W. Services, Inc.*, 190 NLRB 499 (1971); *Great Lakes Dredge & Dock Co.*, 169 NLRB 631, 635 (1968); *The Hughes Corporation*, 135 NLRB 1222, 1223 (1962); *Atlantic Maintenance Co.*, 134 NLRB 1328, 1330 (1961), enforced, 305 F2d 604 (3d Cir. 1962); *Lamar Creamery Co.*, 115 NLRB 1113, 1115 (1956), enforced, 246 F2d 8 (5th Cir. 1957); *Pacific American Shipowners Association*, 98 NLRB 582, 601 (1952).

awarded ['rightful place' seniority remedies] as a matter of course—not randomly or in the exercise of a standardless discretion, and not merely where employer violations are peculiarly deliberate, egregious or inexcusable." 43 L.W. at 4885.[32]

In sum, the "rightful place" remedy has always been recognized as an integral component of an equitable seniority system. It must be awarded if employees are to be made whole for the discrimination they have suffered. It is in no sense "preferential."[33] It is, accordingly, wholly consis-

[32] In light of this standard, we think there could be few, if any, cases where there would be justification for denying a discriminatee his "rightful place" seniority for fringe benefit, layoff, recall, promotion or demotion purposes (categories 1, 2 and 3 discussed at pp. 24-25, *supra*). There might be instances, however, where a court could justifiably conclude that it would be unfair to permit the immediate full use of "rightful place" seniority for the types of purposes listed in category 4, *supra*. For example, if all employees are required at the outset of their employment to endure adverse working conditions (e.g., night shift, undesirable runs, etc.), it might be a windfall to allow one to escape those conditions altogether. Of course, even for these purposes it would be necessary to invest the discriminatee with his full seniority after some initial "running of the gauntlet," lest he be forever deprived of the more desirable working conditions available only to the most senior employees.

[33] Ironically, the court below had no difficulty recognizing the propriety of the rightful place remedy in that portion of this case which is not before this Court. Those employees who had been discriminatorily assigned at the time of hire were awarded the right to transfer with company seniority, so that they would be able to reach the jobs in their new departments which they would be holding had they never been discriminated against. 495 F.2d at 414-417. The "rightful place theory dictates that we give the transferring discriminatee sufficient seniority carryover to permit the advancement he would have enjoyed, and to give him the protection against layoff he would have had, in the absence of discrimination." *Bing* v. *Roadway Express*, Inc., 485 F.2d 441, 450 (5th Cir. 1973).

tent with the congressional objectives embodied in Title VII.[33a]

As we have shown, analysis of this case from the proper perspective—first identifying the dual congressional objectives, and then evaluating the remedy sought in light of those objectives—leads to the same result in this case as petitioners reach, albeit by a different path. But as we noted at the outset, the importance of articulating the correct analytical standard lies in its impact upon other cases, presenting a different issue, which are already reaching this Court's doorstep. So that the Court is aware of that other issue, and its ramifications, we briefly describe it in the next section.

C. The "Last In, First Out" Layoff Cases, and the Implications of the Congressional Determination to Preclude Preferential Treatment

In recent years, as the nation has entered a recession and employees have begun to be laid off in large numbers, a new Title VII issue has arisen. Young minority and female workers are contending that they should be afforded

Accord: *Robinson* v. *Lorilard Corp.*, 444 F.2d 791, 795-800 (4th Cir. 1971); *U.S.* v. *Bethlehem Steel Corp.*, 446 F.2d 652, 660-661 (2nd Cir., 1971); *U.S.* v. *N.L. Industries, Inc.*, 479 F.2d 354, 374-375 (8th Cir., 1973); *Bowe* v. *Colgate Palmolive Co.*, 489 F.2d 896, 901 (7th Cir. 1973); *Thornton* v. *East Texas Motor Freight*, 497 F.2d 416, 419 (6th Cir. 1974); *EEOC* v. *Detroit Edison Co.*, 10 FEP Cases 239, 250 (6th Cir. 1975).

[33a] As explained in the Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae, p. 18, this statement is not applicable to discriminatory refusals to hire prior to the effective date of the Act (July 2, 1965), as Congress made a deliberate judgment to preclude "rightful place" remedies for pre-Act discrimination. In the instant case the discrimination occurred after the effective date of the Act, and thus that exception has no application here.

special seniority protections against layoff, *not* because they themselves have been discriminated against, but because discrimination against others has produced a situation in which preferential protection against layoff is the only way to preserve racial or sexual balance in the workforce.

The decision which has fueled the controversy is *Watkins* v. *United Steelworkers of America*, 369 F.Supp. 1221 (E.D. La., 1973), pending on appeal to the Fifth Circuit as No. 74-2604. In *Watkins*, the company historically had hired only white employees, but in recent years began hiring young blacks as they graduated high school and entered the job market. The company came upon hard times, and found it necessary to lay off half of its workers. Under the terms of the collective bargaining agreement, layoffs were made in inverse order of seniority. Only those employees who had been hired before 1952 were kept at work. All whites hired thereafter, and all the blacks hired in recent years, were laid off.

The recently-hired blacks instituted an action contending that the company had violated Title VII by laying them off. These employees did not contend that they had suffered any prior discrimination; indeed, they conceded that they had been hired as soon as they applied. They noted, however, that the company had discriminatorily refused to hire a prior generation of blacks, and thus that there were no blacks in the workforce with sufficient seniority to survive the layoff. They sought a remedy which would keep themselves at work, while requiring the layoff of whites who had been hired in 1951. They reasoned that this remedy was appropriate in order to preserve the integrated character of the workforce.

The district court ruled in favor of the plaintiffs. It directed the company to establish separate black and white seniority lists, and to lay off employees separately from those two lists in such a manner that the percentage of black employees in the workforce would remain the same after layoff as before. The practical effect of the district court's order, of course, was to provide a seniority preference to young black workers over whites who had been hired before they were born.

The district court's ruling in *Watkins* is an example of what Congress intended not to allow under Title VII, and what §§ 703(h) and (j) were enacted to make doubly sure could not occur. Manifestly, the plaintiffs in *Watkins* were not being awarded their "rightful place"—they were already in their "rightful place"—but rather were being given special rights to make up for the fact that their ancestors had been victimized by the company's prior discrimination. The district court acknowledged that its remedy was "preferential," and that the beneficiaries would be "persons other than those who were victims of the original discrimination." 369 F.Supp. at 1231. But the court thought these objections were outweighed by the need "to insure that, because the Company hired no blacks for twenty years, the plant will not operate without black employees for the next decade." *Ibid.*

The courts of appeals—including the Seventh Circuit in the *Waters* case now pending on petition for certiorari—have rejected the *Watkins* analysis, and have construed Title VII as not authorizing remedies for those who cannot prove that they have suffered discrimination.[34] These courts have concluded that Congress did not intend the

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[34] *Waters* v. *Wisconsin Steel Works*, 502 F.2d 1309, 1317-20 (7th Cir. 1974), petition for certiorari pending, No. 74-1064; *Jersey*

courts to deprive senior employees of their jobs in order to make room for junior minority and female employees who, although not themselves the victims of discrimination, seek reparations for discrimination visited upon others.

These appellate repudiations of the *Watkins* holding derive additional support from the courts' universal rejection of preferential seniority remedies in the one other context in which they have been sought. In several of the discriminatory assignment cases (see pp. 28-29, n. 33, *supra*), discriminatees have sought remedies which would yield them a seniority status superior to their rightful place. The courts have rejected those requests, and awarded the discriminatees only rightful place seniority. In *Quarles* v. *Philip Morris, Inc.*, 279 F.Supp. 505 (E.D. Va. 1968), Judge Butzner, declaring that "the [legislative] history leads the court to conclude that Congress did not intend to require 'reverse discrimination,'" *id.* at 516, rejected a portion of plaintiffs' proposed remedy which "would prefer Negroes even though they might have less seniority than whites. Nothing in the Act indicates this result was intended." *Id.* at 519. Similarly in *Bing* v. *Roadway Express, Inc.*, 485 F.2d 441, 451 (5th Cir. 1973), the court rejected a proposal which would have yielded discriminatees "more seniority than they would have had in the absence of discrimination." Accord: *Thornton* v. *East Texas Motor Freight*, 497 F.2d 416, 420 (6th Cir. 1974); *Rodriguez* v.

Power Central & Light Co. v. *International Bhd. of Electrical Workers*, 508 F.2d 687, 705-710 (3rd Cir. 1975); *U.S.* v. *Local 189, United Papermakers*, 416 F.2d 980, 994-995 (5th Cir. 1969) (dictum), cert. denied, 397 U.S. 919 (1970). Accord: *Cox* v. *Allied Chemical Corp.*, 392 F. Supp. 309, 318-320 (M.D. La. 1974). Contra: *Loy* v. *City of Cleveland*, 8 FEP Cases 614 (N.D. Ohio 1974); *Delay* v. *Carling Brewing Co.*, 10 FEP Cases 164 (N.D. Ga. 1974); *Schaefer* v. *Tannian*, 10 FEP Cases 897 (E.D. Mich. 1975).

East Texas Motor Freight, 505 F.2d 40, 63-64 and n. 30 thereat (5th Cir. 1974).

II. This Case Should Not Be Decided on the Basis of 42 U.S.C. § 1981.

A. As an alternative ground for reversal petitioners invoke § 1 of the Civil Rights Act of 1866, 42 U.S.C. § 1981. They contend that § 1981 was violated by the refusal to hire them and that the appropriate remedy for that violation is not affected by § 703(h) of the 1964 Act. As we have shown, petitioners are entitled to prevail in this case because neither § 703(h) nor any other provision of the 1964 Act prevents giving "rightful place" seniority to an individual who was denied a job because of his race. It is therefore not necessary to consider in this case the interrelationship between the 1866 and 1964 statutes. And it would be entirely inappropriate to decide this case on the basis of the earlier Act because petitioners relied exclusively on the 1964 Act when, in the court of appeals, they challenged the district court's denial of seniority credit. The court of appeals' failure to discuss § 1981, which petitioners criticize here (br. 40) is therefore readily understandable. As this Court stated in an earlier civil rights case, *Adickes* v. *S. H. Kress and Co.*, 398 U.S. 144, 147, n. 2 (1970):

> "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them. Lawn v. United States, 355 U.S. 339, 362-363, n. 16 (1958); Husty v. United States, 282 U.S. 694, 701-702 (1931); Duignan v. United States, 274 U.S. 195, 200 (1927). We decline to do so here."

B. While we submit that no question under the 1866 Civil Rights Act need or should be reached in this case, we briefly state our understanding of that statute and its relationship

to the 1964 Act. Here again, our views differ from those of the petitioners, although not in a manner which would affect the outcome of the present action. In *Johnson* v. *Railway Express Agency, Inc.*, 43 L.W. 4623, 4625 (May 19, 1975), this Court joined the courts of appeals which had held "that § 1981 affords a federal remedy against discrimination in private employment on the basis of race,"[35] and declared that "[a]n individual who establishes a cause of action under § 1981 is entitled to both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages."

Where, as here, individuals have been refused a job because of their race, the award to them of "rightful place" seniority is, for the reasons stated at pp. 24-29 *supra*, "suitable" (42 U.S.C. § 1988). Therefore, there is no inconsistency in this case between the remedial provisions of the 1866 Act (§ 3 of which is now 42 U.S.C. § 1988)[36] and any provision of the 1964 Act. Conversely, there is no conflict between the two statutes with respect to the individual who, as in the *Watkins*-type situation, has not been discriminated against on the basis of race. This is true be-

[35] Since the present case involves discrimination in hire, we have no occasion to discuss the scope of the substantive right created by § 1981 with respect to employment matters other than refusal to hire. That question is raised in the Cross-Petition for Certiorari in the *Waters* litigation, *United Order of American Bricklayers, etc.* v. *Waters*, No. 74-1350, pp. 2, 17.

[36] Section 1988 provides:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or

cause one who is not a discriminatee has no cause of action under the 1866 Act. Plainly, the basic policy of Title VII against giving anyone preference in employment because of his race is that of the 1866 Act as well, as appears from the language of § 1, "all persons • • • shall have the same right • • • as is enjoyed by white citizens • • •." That the 1866 and 1964 Acts, whatever their other differences (cf. *Johnson*, 43 L.W. at 4625), are identical in this particular was well stated by the Court of Appeals for the Sixth Circuit in *Long* v. *Ford Motor Co.*, 496 F.2d 500, 505 (1974) (footnotes omitted):

> "Section 1981 is by its very terms, however, not an affirmative action program. It is an equalizing provision, seeking to ensure that rights do not vary according to race. It does not require that persons be accorded preferential treatment because of their race. On this point we view the Supreme Court's discussion of Title VII as applicable to Section 1981:
>
> 'Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required

are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. (R. S. § 722.)

by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.' Griggs v. Duke Power Co., 401 U.S. 424, 430-431."

CONCLUSION

For the reasons stated above, the decision below should be reversed.

Respectfully submitted,

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Respondent United Steelworkers of America, AFL-CIO, and American Federation of Labor and Congress of Industrial Organizations, as amicus curiae, file this supplemental brief to call the Court's attention to, and to briefly describe, the Fifth Circuit's decision in *Watkins* v. *United Steelworkers of America,* 516 F.2d 41, issued on July 16, 1975, subsequent to the filing of our main brief.

In our main brief, we urged an interpretation of Title VII which would distinguish between two types of cases in which minority employees seek seniority relief. On the one

hand are cases such as the instant case, where the actual victims of discrimination seek the seniority standing they would have had but for the discrimination—their "rightful place." We argued that in this situation the claimants are entitled to the relief they seek. On the other hand are cases in which minority employees who are not themselves victims of discrimination seek enhanced seniority as reparation for a history of prior discrimination against *others*. We argued that in this situation the claimants are *not* entitled to the relief they seek—indeed, that this is the very result which Sections 703(h) and (j) were enacted to prevent. Those provisions made clear what Congress had intended all along: that victims of discrimination should be made whole, but minority preferences should not be permitted. We cited the district court's decision in *Watkins,* 369 F. Supp. 1221 (E.D. La. 1973), as an example of failure to recognize the Congressional "cutting line", for the court there awarded enhanced seniority protection to minority employees who had never suffered discrimination.

The Fifth Circuit has now reversed the district court's decision in *Watkins,* and adopted the precise interpretation of Title VII for which we contend. The court's opinion begins by reciting its "precise holding", 516 F.2d at 44:

> "We hold that, regardless of an earlier history of employment discrimination, when present hiring practices are non-discriminatory and have been for over ten years, an employer's use of a long-established seniority system for determining who will be laid-off, and who will be rehired, adopted without intent to discriminate, is not a violation of Title VII or Section 1981, even though the use of the seniority system results in the discharge of more blacks than whites to the point of eliminating blacks from the work force, where the individual employees who suffer layoff under the system have not themselves been the subject of prior employment discrimination."

The court explained that each of the plaintiffs, who was hired when he first applied and enjoyed a seniority date coincident with his hiring date,

> "has his rightful place in the employment hierarchy, without regard to race. . . . Each is treated equally with white persons who have places equal to his in the hierarchy. No individual black employee is, because of his race, more likely than his white counterpart to be affected by the applicable criteria, seniority." *Ibid.*

The court concluded that to grant the plaintiffs seniority preference in these circumstances would constitute "preferential treatment on the basis of race which Congress specifically prohibited in Section 703(j)." *Id.* at 46. The court further held that Section 703(h) precludes an award of enhanced seniority which is not necessary to enable employees to reach their "rightful place." *Id.* at 46-47. The court observed that this analysis would remain correct even if this Court reverses in the instant case (as petitioners and we urge that it should):

> "Although the Supreme Court has issued a writ of certiorari for *Franks* so that the holding there will be reviewed, a contrary holding in *Franks* would not change the soundness of denial of fictional seniority relief to those who suffered no personal discrimination, as is the case here." *Id.* at 47.

The Fifth Circuit discerned a clear Congressional distinction between "remedial and preferential treatment." *Id.* at 47. Reviewing the legislative history, the court concluded:

> "It is quite apparent that, regardless of what that history may show as to Congressional intent concerning the validity of seniority systems as applied to persons who have themselves suffered from discrimination, there was an express intent to preserve contractual

rights of seniority between whites and persons who had not suffered any effects of discrimination." *Id.* at 48.

Turning to the district court's alternative reliance upon 42 U.S.C. § 1981, the court found it unnecessary to investigate the extent to which the scope of § 1981 should be reconciled with that of Title VII (*id.* at 49-50), for it found no violation of § 1981:

> "[T]he black plaintiffs received the identical employment benefits, terms and conditions as their white counterparts. The collective bargaining agreement was, in fact, color blind. . . . The layoff provision of the instant seniority system is not only facially nondiscriminatory; it does not perpetuate the effects of past discrimination as to these plaintiffs. When hired, these plaintiffs obtained the same contract rights as white citizens then hired. Blacks are guaranteed the same rights as whites under Sec. 1981, not greater rights. Long v. Ford Motor Co., 496 F.2d 500, 505 (6th Cir. 1974)". *Id.* at 50.

The court carefully delineated two issues which it was *not* deciding:

> "We specifically do not decide the rights of a laid-off employee who could show that, but for the discriminatory refusal to hire him at an earlier time than the date of his actual employment, or but for his failure to obtain earlier employment because of exclusion of minority employees from the work force, he would have sufficient seniority to insulate him against layoff." *Id.* at 45.

The first of these, of course, is the instant case. We have already explained, in our main brief, why such an employee *should* be awarded his "rightful place" seniority. The second situation not reached in *Watkins* is not presented here either. It would arise in a case where an employee who

had not applied for employment earlier claimed that he would have done so but for his knowledge that the employer did not hire minorities and thus that application would have been futile. What rights, if any, Title VII gives to individuals who have not made application for employment depend upon the resolution of several considerations, including problems of proof such as those discussed by this Court in *Blue Chip Stamps* v. *Manor Drug Stores,* 43 U.S. 4707 (June 9, 1975), and the question of standing discussed in *Jackson* v. *Sargent,* 394 F.Supp. 162, 168-169 (D. Mass. 1975). These considerations can, of course, best be assessed on a record in which such a claim is advanced.

Respectfully submitted,

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October 29, 1975

Mr. Michael Rodak, Jr., Clerk
Supreme Court of the United States
Washington, D. C. 20543

Re: Franks v. Bowman Transportation Co. (No. 74-728)

Dear Mr. Rodak:

In this case, respondent United Steelworkers of America, AFL-CIO (USWA), has filed a joint brief with the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), which received the consent of all parties to file as an amicus curiae. When that brief was filed, you questioned the appropriateness of a party and an amicus curiae filing a joint brief. We explained that there were unique circumstances which made a joint brief appropriate here. Upon hearing our explanations, you asked that we reiterate in writing our reasons.

USWA is the largest affiliate of the AFL-CIO. Counsel for USWA and counsel for the AFL-CIO work closely together in a wide variety of matters; indeed, they are in virtual daily communication. It is inevitable, therefore, that whenever certiorari is granted in a case to which USWA is a party, counsel for USWA and for AFL-CIO discuss their respective views. This occurred when certiorari was granted in the instant case, and counsel discovered that the views of their clients exactly coincided, and further that their (counsel's) own thoughts as to how a brief should be structured likewise coincided.

These discoveries posed a dilemma. We thought it would be burdensome to the Court for USWA and the AFL-CIO to file separate briefs containing identical substantive discussions.

Of course, AFL-CIO might have opted not to file an amicus curiae brief at all, simply providing input into USWA's brief. But given the legal and social significance of this case, and the fact that USWA, although a respondent, agrees that petitioners are entitled to the relief they seek, it seemed to us important that the Court know that USWA's position is not aberrational, but rather reflects a view shared by the majority spokesman for the labor movement. In the circumstances, we concluded that the most appropriate course would be the filing of a joint brief.

It has now become appropriate to file a short supplemental brief discussing a decision which issued subsequent to the filing of our main brief, Watkins v. United Steelworkers of America, 516 F.2d 41 (fth Cir., July 16, 1975). To maintain consistency with our prior actions and for the same reasons as before, we have filed the supplemental brief jointly.

Sincerely,

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Michael Gottesman
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Counsel for USWA

BEST COPY AVAILABLE

Supreme Court, U. S.
FILED
OCT 29 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-728

HAROLD FRANKS and JOHNNIE LEE,

Petitioners,

v.

BOWMAN TRANSPORTATION COMPANY, INC., et al.,

Respondents.

REPLY BRIEF FOR PETITIONERS

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In the

Supreme Court of the United States

October Term, 1974

No. 74-728

Harold Franks and Johnnie Lee,

Petitioners,

v.

Bowman Transportation Company, Inc., et al.,

Respondents.

REPLY BRIEF FOR PETITIONERS

1.

No party or amicus curiae defends in this court the Fifth Circuit's holding that § 703(h) of Title VII[1] prohibits the award of retroactive seniority. Respondent United Steelworkers of America (USWA) urges that the holding below was incorrect and that Petitioners are entitled to the relief they seek.[2] The government also urges reversal of the Fifth Circuit's holding.[3] Respondent Bowman admits that the Court of Appeals' reasoning is untenable and that retroactive seniority may sometimes be awarded; however, it seeks affirmance of the result on a ground entirely different

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[1] 42 U.S.C. § 2000e-2(h).

[2] USWA brief at 6, 9-10, 28-29. As collective bargaining representatives of the white employees whose seniority standing would be affected by the relief sought, USWA's concession that the Fifth Circuit erred carries particular weight.

[3] Government brief at 14-17.

from any considered below.[4] Although the briefs offer slightly different interpretations of § 703(h) and its legislative history, none of these interpretations would sustain the ruling below.[5] On the only question concerning the application of § 703(h) which is before the Court, all the parties agree: the Fifth Circuit's ruling that § 703(h) prohibits any award of retroactive seniority is erroneous.[6]

The remedial scheme of Title VII, which centers on § 706(g),[7] is a comprehensive one reflecting a national commitment of highest priority. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44-45; *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975); *Albemarle Paper Co.* v. *Moody*, 45 L.Ed.2d 280, 297 (1975). Remedial limitations should, therefore, be found only where clearly intended by Congress or required by policy.[8]

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[4] Co. brief at 6, 12-13; see part 2, *infra*, pp. 5-6.

[5] Even the Fifth Circuit has recently indicated uncertainty as to whether *Franks* was correctly decided. See, *e.g.*, *United States* v. *T.I.M.E.-D.C., Inc.*, 517 F.2d 299, 317 n.33 (5th Cir. 1975).

[6] The Union and Bowman argue that § 703(h) precludes seniority relief designed to remedy the continuing effects of discriminatory refusals to hire which occurred prior to the effective date of the Act (July 2, 1965). USWA brief at 29, n.33a; Bowman brief at 6, 13; see Government brief at 18. While this Court need not reach this question in this case there is persuasive authority that the legislative history does not preclude such relief (see *infra* at pp. 3-5), and that in fact Title VII requires a remedy designed to terminate as quickly as possible all continuing adverse effects of prior discrimination. Petitioners' brief at 29, n.41, 35-37; Note, *Last Hired, First Fired Layoffs and Title VII*, 88 Harv. L. Rev. 1544, 1556 (1975).

[7] 42 U.S.C. § 2000e-5(g).

[8] Elsewhere the Fifth Circuit has observed, "Title VII is strong judicial medicine and we refuse to vitiate its potency by glossing it with judicial limitations unwarranted by the strong remedial spirit of the act." (Footnote omitted) *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1377 (5th Cir. 1974).

In the absence of any precise definition of the key term of § 703(h), "bona fide seniority or merit system," in the section's text or legislative history,[9] no applicable remedial limitation should be found here. Generalities about "preferential treatment" and "rightful place"[10] are not conclusive; the crucial fact is the lack of evidence that Congress addressed any specific seniority issues, such as retroactive seniority relief, in adopting § 703(h). Nothing in the legislative history shows that the Clark-Case materials[11] reflect any *specific* Congressional intention as to seniority.[12] Moreover, those materials say nothing pertinent to this case about the legality of Bowman's seniority system.[13]

Respondents' reliance on *H. K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970), as precedent for finding implied remedial restrictions in a provision that defines unlawful conduct is

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[9] See Petitioners' brief at 20-21, 24-31.

[10] *Cf.* USWA brief at 9-12, 20-21.

[11] The Clark-Case Interpretative Memorandum, 110 Cong. Rec. 7212-15 (1964); Interpretative Memorandum prepared by Department of Justice, 110 Cong. Rec. 7206-07 (1964); answers prepared by Sen. Clark to questions presented by Sen. Dirksen, 110 Cong. Rec. 7215-17 (1964). See Petitioners' brief at pp. 25-26, nn. 34-36.

[12] *Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385 (1972), which USWA cites for the proposition that a Congressional sponsor's interpretation must be controlling, is inapposite here. This Court in *Pipefitters* adopted Sen. Taft's statements construing § 304 of the Taft-Hartley Act because (1) he was explicating provisions already before the Senate in the form finally adopted; (2) their meaning was unambiguous; (3) that meaning was in full accord with the statutory scheme; and (4) Sen. Taft's statements were made in floor colloquy with colleagues who sought specific reassurance as to the scope of the limiting effect of § 304. The Clark-Case materials lack these indicia of an authoritative construction.

[13] The Clark-Case materials do not even address the issues raised by seniority systems, like Bowman's, which freeze the effects of post-Title VII hiring discrimination. Here, black workers are "low man on the totem pole," *cf.* 110 Cong. Rec. 7207, precisely because of their race and Bowman's past policy of racial exclusion.

unpersuasive. The definitional provision involved there[14] was not, as is § 703(h), vague or subject to divergent interpretations; it states quite clearly what Congress intended the NLRB *not* to order.[15] This Court merely held in *H. K. Porter Co.* that in the face of unambiguous language establishing that employers were not to be compelled by the statutory scheme to accept particular terms, the general remedial provision of the Act[16] should not be read to allow the Board to compel such acceptance, 397 U.S. at 107-08. But § 703(h) and its legislative history, in contrast, do not clearly indicate what the Congressional policy is with respect to particular seniority issues under Title VII.

Rather than adopting any vague generalities incorporating prohibitions on full seniority relief, the courts should look to § 703(h) as the starting point for an equitable analysis in light of the remedial purpose of Title VII and the broad scope of § 706(g).[17] See Note, *Last Hired, First Fired Layoffs and Title VII*, 88 Harv. L. Rev. 1544, 1551-57 (1975). That analysis would, in each case, carefully weigh

[14] Section 8(d) of the Labor Management Relations Act (1947), 29 U.S.C. § 158(d).

[15] The duty to bargain collectively, enforceable by the Board, "does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d).

[16] Section 10(c), 29 U.S.C. § 160(c).

[17] The Fifth Circuit's recent decision in *Watkins* v. *United Steelworkers of America, Local No. 2369*, 516 F.2d 41 (5th Cir. 1975), *rev'ing* 369 F. Supp. 1221 (E.D. La. 1974), is consistent with Petitioners' position. In *Watkins*, the Court of Appeals reversed a holding that layoffs which adversely affect black employees of an employer that long ago refused to hire blacks are necessarily unlawful. The Court in *Watkins* limited its holding to certain facts presented there. In particular, it precluded a remedy only in the case of employees who had not been subjected to a prior system of discrimination and who were already in their "rightful place," 516 F.2d at 44-46. The facts and rationale of *Watkins* make it inapplicable to the instant case.

the facts to achieve a just remedy, *cf. Meadows* v. *Ford Motor Co.*, 510 F.2d 939, 949 (6th Cir. 1975), *petition for certiorari pending*, No. 74-1349. In this case, the propriety of retroactive seniority is manifest.

2.

Bowman's attempt to save the result below on the theory that it embodies a proper exercise of remedial discretion is unfounded in the record or in law.

Both the District Court and the Court of Appeals denied relief because they viewed retroactive seniority as being barred by a rule of law.[18] But the District Court, in a cryptic and unsupported comment, added that retroactive seniority was also denied "in the exercise of discretion," Pet. A.54. This unexplained assertion of "discretion," derived from an erroneous view of controlling legal principles,[19] has nothing in common with the purposeful equitable analysis required by *Albemarle Paper Co.* v. *Moody*, 45 L.Ed.2d 280, 296 (1975).

Bowman's "discretion" argument ignores the cardinal principles, recently clarified by this Court, governing equitable discretion in Title VII cases, *Albemarle Paper Co.*

[18] See Pet. A.53-A.54; 495 F.2d at 417-18, Pet. A.30-A.31. Far from "allowing" any exercise of discretion by the District Court, the Fifth Circuit holding removes retroactive seniority from the array of equitable remedies available under Title VII.

[19] The District Court held retroactive seniority barred because, in its view, (1) only named plaintiffs who had filed EEOC charges could recover individual relief, and (2) Title VII's preference for conciliation precludes class-wide remedies. Those rules of law have been repudiated by the Fifth Circuit in this case, 495 F.2d at 422, Pet. A.37-A.39, and by this Court, *Albemarle Paper Co.* v. *Moody*, 45 L.Ed.2d 280, 294-95 n.8 (1975). Yet Bowman still advances them as proper foundations for the District Court's purported exercise of discretion. Co. brief at 25-30.

v. *Moody, supra,* 45 L.Ed.2d at 296-298. Any attempt to justify denial of retroactive seniority in this case as "discretionary" would be incompatible with this Court's recognition that the fundamental Congressional purpose which district courts have discretion to achieve is to "make whole" the victims of discrimination; and that Title VII confides broad equitable powers to the district courts to "secur[e] complete justice," *Albemarle, supra,* 45 L.Ed.2d at 297.[20]

Finally, in light of its continuing bad-faith policies of discrimination,[21] Bowman may not even properly invoke the principles of equity to support its defense, *Albemarle, supra,* 45 L.Ed.2d at 299. Accordingly, the District Court could not make Bowman the beneficiary of equitable discretion.

3.

Whatever precise meaning this Court attributes to § 703 (h) of Title VII and its legislative history, no limitation on retroactive seniority thereby attaches to 42 U.S.C. § 1981. This Court's decision last term in *Johnson* v. *Railway Express Agency, Inc.,* 421 U.S. 454 (1975), pretermits any argument that purported limitations on Title VII relief can be engrafted onto the broad provisions of the earlier statute. In *Johnson* the Court held,

> that the remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent.

421 U.S. at 461. The Court observed that in some respects § 1981 offers more relief than Title VII, and in other respects less, see 421 U.S. at 458-61. Of particular pertinence

[20] The District Court gave no equitable reasons to support its exercise of "discretion," and there are none. *Cf.* Co. brief at 17-19.

[21] See Petitioners' brief at 6-10.

here, this Court reasoned in *Johnson* that despite Title VII's "range and its design as a comprehensive solution for the problem of invidious discrimination in employment, the aggrieved individual clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief," 421 U.S. at 459. The Fifth Circuit, therefore, erred in failing to award relief under 42 U.S.C. § 1981.[22]

Respondents do not dispute the correctness of Petitioners' position on the § 1981 issue; rather they urge that the Court cannot reach it because they assert this issue was not squarely raised below. Both Franks' complaint and Lee's complaint specifically stated claims under § 1981 as a basis of jurisdiction and an alternative basis for all the relief sought (4a ff; 14a ff). The case was tried on this basis.[23] Because the Fifth Circuit's ruling *sua sponte* injected the § 703(h) bar issue into this case, the parties had neither briefed nor argued it below, nor had they specifically argued whether § 1981 provides an additional ground for relief.[24] Nonetheless, the § 1981 issue was clearly before the Fifth Circuit: Petitioners' brief on appeal specified that their complaints sought relief under 42 U.S.C. § 1981 as well as Title VII, see brief in Fifth Circuit, No. 72-3239 at 2-3.

[22] *Cf. Waters* v. *Wisconsin Steel Works of International Harvester Co.,* 502 F.2d 1309, 1320 n.4, *pending on petition for certiorari,* No. 74-1064. The Fifth Circuit has now adopted a position on § 1981 relief "consistant [sic] with" that of *Waters. Watkins* v. *United Steelworkers of America, Local No. 2369,* 516 F.2d 41, 50 (5th Cir. 1975).

[23] The trial judge chose not to rule specifically on the § 1981 ground but denied the relief sought.

[24] The parties' arguments centered on whether retroactive seniority relief was appropriate in the case—an issue equally applicable to either Title VII or § 1981.

Petitioners squarely presented the retroactive seniority issue under 42 U.S.C. § 1981 in their Petition for a Writ of Certiorari, and Respondents did not then object to the grant of certiorari on that question. This Court, having issued the writ to review that properly presented question of law, which is of national significance, should not be deterred from deciding the question merely because the lower courts did not specifically address this question in their opinions.[25]

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[25] The decisions cited by Bowman (brief at 17) and USWA (brief at 33) are inapposite. The Court has refused to decide issues which were not presented by the pleadings, *McCullough* v. *Kammerer Corp.*, 323 U.S. 328 (1945); which were not assigned as error to the Court of Appeals (where required), *McCullough* v. *Kammerer Corp., supra; Duignon* v. *United States,* 274 U.S. 195, 200 (1927); where no appeal was taken from an adverse district court decision and where the Court of Appeals did not consider the issue, *Adickes* v. *S.H. Kress and Co.,* 398 U.S. 144, 147 n.2 (1970); or which were not raised in the petition for certiorari, *Zellerbach Paper Co.* v. *Helvering,* 293 U.S. 172, 182 (1934).

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-728

HAROLD FRANKS and JOHNNIE LEE,
Petitioners,

vs.

BOWMAN TRANSPORTATION, INC., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM SUGGESTING MOOTNESS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM SUGGESTING MOOTNESS

1. This case is here on writ of certiorari to the United States Court of Appeals for the Fifth Circuit. The action, originating in the United States District Court for the Northern District of Georgia, was based on Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.*, and 42 U.S.C. §1981. The question before this Court relates to the denial below of retroactive seniority to certain unsuccessful black applicants for over-the-road driving positions.

The action was brought by Harold Franks, plaintiff, alleging acts of racial discrimination at the company's Atlanta, Georgia, terminal and also alleging as racially discriminatory the company's discharge of Franks at the Atlanta terminal on May 13, 1968 (4a-12a).[1] Subsequently, Johnnie Lee filed an intervenor's complaint alleging that the company was following a racially discriminatory policy and practice of excluding black persons from over-the-road driving jobs. Lee alleged that the company had discriminated against him by denying him employment as a road driver from January to August, 1970, and, after employing him in September, 1970, by discharging him from the company's employ on March 18, 1971 (14a-19a).

The District Court approved a class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure. It found two classes of black employees at the company's Atlanta terminal, both represented by the plaintiff Franks. The court found a "Class 3" consisting of black applicants for positions as road drivers over the company's entire system, and a "Class 4" consisting of black employees who applied to transfer to over-the-road driving positions. Classes 3 and 4 were represented by the intervenor Lee (Pet. A53, A66-A67).[2]

The District Court found that the company discriminated against the intervenor by refusing to hire him before his actual employment in 1970, and ordered that Lee should recover $6,124.58 from the company as lost wages.[3] The District Court also found that Lee's discharge was not

1. References in this form are to the single appendix filed with petitioners' brief.

2. References in this form are to the appendix to the petition for a writ of certiorari.

3. This amount was paid by Bowman soon after the court's decree.

racially discriminatory, and ordered that he should recover nothing by reason of his discharge (Pet. A59-A64, A70). The Court of Appeals affirmed the judgment of the District Court insofar as it related to Lee's individual claim (Pet. A14, A40). The question before the Supreme Court relates entirely to the class of unsuccessful applicants for road-driving jobs who are purportedly represented by the intervenor Lee. In view of his discharge and the finding adverse to him on the discharge claim, Lee has no personal stake in the question before this Court.

2. By reason of the foregoing facts the dispute between the intervenor Lee and the defendants has been fully resolved. Lee's claim has been litigated to a conclusion, and there is no case or controversy now pending between the intervenor and the company or union. The case therefore is moot. *Board of School Commissioners of the City of Indianapolis* v. *Jacobs*, ... U.S. ....., 43 L.Ed. 2d 74 (1975). Under this Court's ruling in the cited case, where a case or controversy no longer exists between the named plaintiff (the intervenor here) and the defendants, the case is moot unless (1) it was certified as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure, (2) a controversy still exists between defendants and the present members of the class, and (3) the issue in controversy is such that it is capable of repetition yet evading review. See *Sosna* v. *Iowa*, ... U.S. ....., 42 L.Ed. 2d 532 (1975). Although this case was certified as a class action (the element missing in *Board of School Commissioners, supra*), it does not present an issue that is capable of repetition while still evading review. Thus the third element necessary to overcome mootness is clearly absent. Since no other member of this class is asserting a claim, the second element also is apparently missing.

For the foregoing reasons, it is suggested that the case be remanded to the Court of Appeals with instructions to order the District Court to dismiss the intervenor's complaint.

Respectfully submitted,

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v.

BOWMAN TRANSPORTATION COMPANY, INC., *et al.*

Memorandum of Respondent United Steelworkers of America, AFL-CIO In Opposition to Suggestion of Mootness

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-728

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Respondent Bowman Transportation, Inc. suggests that this case has become moot. We disagree.

This case was brought on a complaint alleging racially discriminatory employment practices in violation of Title VII of the Civil Rights Act of 1964. It was properly certified as a class action by the district court. Intervenor Lee was named to represent a sub-class consisting of black applicants for positions as over-the-road drivers. The claim asserted on behalf of the members of this sub-class was that they had been denied such positions on the basis of race. After the full litigation of this claim, the district court found that the members of this sub-class had in fact been

victims of racial discrimination in hiring. As part of the remedy for this discrimination, the district court ordered that the members of this sub-class be given immediate priority in hiring. The district court refused, however, to order that, upon being hired, these members of the sub-class be given seniority back to the date they were denied employment on the basis of their race. This denial of seniority relief was appealed to the Fifth Circuit, but to no avail. The issue has been brought to this Court. As we now show, though the named sub-class representative, Lee, has subsequent to the class certification lost his personal stake in the resolution of this issue, the case is not moot.

The question of seniority relief remains "real and immediate" for those sub-class members now employed by respondent Bowman. Put succinctly, they have suffered a wrong; they have reasonably relied upon this lawsuit to provide full vindication for that wrong; to abort this case now would prolong the period of their suffering, might well jeopardize their ability ever to obtain their full measure of relief, and at least would result in redundant litigation. The decisions of this Court, as we read them, do not call for such a senselesss result.

1. This case as it now stands does not involve "conjectural" or "hypothetical" issues or people. *Cf. O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974); *Golden* v. *Zwickler*, 394 U.S. 103, 109-110 (1969). It involves employees who have in the course of this very litigation been adjudged victims of racial discrimination, and who now have a real stake in securing a remedy for that discrimination.

When the instant lawsuit was filed and then certified as a class action, these employees (then rejected applicants), as class members, were entitled to rely upon it as the vehicle for asserting their claims of employment discrimination. Their stake in this litigation was from the beginning quite substantial: If the suit were successful, they would reap

substantial benefits; if it were lost, they would be bound by that result. Rule 23(c)(3) of the Federal Rules of Civil Procedure. Precisely because of their interest, the suit could not have been settled or dismissed by the named litigants without approval of the court. Rule 23(e).

In fact, the suit was at least partially successful: The members of the sub-class were found to be victims of unlawful racial discrimination, were afforded the opportunity to secure jobs, and were awarded back-pay. However, they were refused by the lower courts—and seek in this Court—the additional seniority which they would have had but for the unlawful discrimination: their "rightful place." The significance of this additional seniority for each employee in the class is discussed at length in our brief on the merits at 24-29. As each day passes without that relief, these employees continue to suffer the effects of the past discrimination in ways that would not fully be compensated by an eventual award of back-pay: they must work the less desirable jobs to which they are relegated by their inferior seniority status.

Having come this far in the litigation, it is now suggested that these employees must start over if they want to claim the full relief to which they are entitled. Would they have to run the gamut of filing new charges with the Equal Employment Opportunity Commission? Would they confront statute of limitations problems? Even if they surmounted these hurdles, they would confront a dispositive precedent of the Fifth Circuit that bars the granting of the seniority relief they seek. Ultimately, only this Court can resolve their claim. Yet, though the class members are presently suffering the effects of their seniority disadvantage, Bowman would have them begin anew and wait several years more before securing relief.

2. Bowman's suggestion that this Court may not now resolve this claim relies on the mechanical application here

of a rule fashioned by this Court to apply to a distinct type of case. Thus, Bowman cites the following language in this Court's decision in *Board of School Commissioners of Indianapolis* v. *Jacobs*, 420 U.S. 128, 129 (1975):

> ". . . [I]t seems clear that a case or controversy no longer exists between the named plaintiffs and the petitioners with respect to the validity of the rules at issue. The case is therefore moot unless it was duly certified as a class action pursuant to Fed. Rule Civ. Proc. 23, a controversy still exists between petitioners and the present members of the class, and the issue in controversy is such that it is capable of repetition yet evading review."

Bowman relies on the portion of that quotation apparently requiring that the issue be "capable of repetition yet evading review." This "element," we are told, is not met here. We disagree that this "element" has application here.

Since the language relied upon by Bowman was *dictum* in *Jacobs*, we pass to a consideration of *Sosna* v. *Iowa*, 419 U.S. 393 (1975), from whence this language came. *Sosna* involved a challenge to a state statute requiring the petitioner in a divorce action to have been a resident of Iowa for one year immediately proceeding the filing of the action. The named plaintiff, Sosna, had filed for a divorce in state court, but her petition was denied for failure to satisfy the residency requirement. She then filed a complaint in federal court challenging the constitutionality of that requirement, and seeking both declaratory and injunctive relief. She brought the case as a class action on behalf of unnamed and unidentifiable class members "who desire to initiate actions for dissolution of marriage or legal separation, and who are barred from doing so by the one-year duration residency requirement. . . ." *Id.* at 397. This class was duly certified. A three-judge district court upheld the constitutionality of the statute. Subsequent to the district court decision but before the case reached this Court, Sosna satisfied the residency requirement (and in fact obtained a divorce elsewhere). This Court then considered the question of mootness.

The Court began its analysis by finding that,

> "When the District Court certified the propriety of the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by appellant." *Id.* at 399.

This status, the Court held, is sufficient for the maintenance of a "case or controversy" within the meaning of Article III of the Constitution, provided a "live controversy" exists between the class members and a named defendant at the time of review by this Court:

> "Our conclusion that this case is not moot in no way detracts from the firmly established requirement that the judicial power of Art. III courts extends only to 'cases and controversies' specified in that Article. There must not only be a named plaintiff who has such a case or controversy at the time the complaint is filed, and at the time the class action is certified by the District Court pursuant to Rule 23, but there must be a live controversy at the time this Court reviews the case. . . . The controversy may exist, however, between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot." *Id.* at 402. (footnotes omitted)

See also, *Id.* at 401, n. 9.

To this point, the analysis of *Sosna* fits and is dispositive of the instant case. But the Court there also had to face a problem not presented here. Once Sosna dropped out of the case, there was in a meaningful sense no real plaintiff left—only a group of unidentifiable short term residents of Iowa who would "desire" to bring a divorce action but for

the residency requirement. In a real sense, this Court was asked to review the constitutionality of a state statute at large. On the other hand, given the length of the residency requirement, the issue would be incapable of review by this Court if the case were held moot. It was to confront this dilemma that the Court established the requirement cited by Bowman.

But this added requirement of *Sosna* has no application here. It is without meaning here to ask whether the issue is "capable of repetition"; the controversy here never went away. The same controversy remains for the same identifiable group of class members as when the case began. Far from an advisory opinion, or at-large review, this case has plaintiffs, and we know who they are.

Our analysis is confirmed by the *Sosna* Court's citation, with approval, of cases in a posture similar to ours, where courts of appeals have ruled that class actions involving the rights of identifiable groups of employees should not be dismissed as moot merely because the claim of the named plaintiff is no longer extant. *Id.* at 401, n. 10; *Moss* v. *Lane Company, Inc.*, 471 F.2d 852 (CA 4 1973); *Roberts* v. *Union Co.*, 487 F.2d 387 (CA 6 1973); *Cf. Albermarle Paper Co.* v. *Moody*, —— U.S. ——, 43 U.S.L.W. 4881, 4883, n. 8 (1975).

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Respondents.

PETITIONERS' OPPOSITION TO SUGGESTION OF MOOTNESS

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PETITIONERS' OPPOSITION TO SUGGESTION OF MOOTNESS

This case is not moot.

Respondent Bowman Transportation, Inc., suggests that this certified class action[1] has become moot, despite the existence of a continuing controversy affecting important rights of class members, because the named plaintiffs' individual rights do not depend on the resolution of the question presented to this Court. The facts are as set forth in Petitioners' brief,[2] and briefly summarized in Bowman's Memorandum Suggesting Mootness. All of these facts were

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[1] The district court formally certified this case as a class action, defined the classes represented by plaintiffs, and provided for notice, on June 28, 1972 and July 14, 1972. (Appendix to Petition for a Writ of Certiorari, A53, A66-A68, A70). The district court's actions fully comport with the requirements of Rule 23(c), Federal Rules of Civil Procedure. Cf. *Board of School Commissioners of Indianapolis* v. *Jacobs*, 420 U.S. 128, 129-130 (1975).

[2] Brief for Petitioners, pp. 5-11.

before the court when it granted the Petition for a Writ of Certiorari.[3]

Principles clarified last term in *Sosna* v. *Iowa,* 419 U.S. 393 (1975), and in *Board of School Commissioners of Indianapolis* v. *Jacobs,* 420 U.S. 393 (1975), refute the suggestions of mootness. The controlling difference between *Sosna* and *Jacobs* was the existence, in *Sosna* alone, of a properly certified and defined class. As a result,

> When the District Court certified the propriety of the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by the appellant. . . . [T]his factor significantly affect the mootness determination. . . .
>
> Although the controversy is no longer live as to appellant Sosna, it remains very much alive for the class of persons she has been certified to represent.

Sosna, supra, 419 U.S. at 399, 401. In contrast, *Jacobs* was moot "*because* the class action was never properly certified nor the class properly identified," 419 U.S. at 130 (emphasis supplied). The instant case, like *Sosna* and unlike *Jacobs,* was "duly certified as a class action pursuant to Fed. Rule Civ. Proc. 23," *Jacobs, supra,* 420 U.S. at 129.

This case fits precisely within the rule for determining mootness announced in *Sosna*:

> [T]here must be a live controversy at the time this Court reviews the case. . . . The controversy may exist, however, between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot.

[3] Petition for a Writ of Certiorari, pp. 5-7.

419 U.S. at 402. Here, a number of class members have a "live controversy" with Respondents with respect to the retroactive seniority issue. Several members of "Class 3"[4] reapplied for OTR jobs pursuant to the district court's decree. Several were hired and still drive for Bowman;[5] their present seniority status is inferior to what it will be if Petitioners prevail here on the merits of the retroactive seniority issue. As a result of their reduced seniority, these individuals are subjected each day they work to terms and conditions of employment tainted by past discrimination. They are unable to compete with full seniority for more desirable runs and shifts; and their income opportunity is diminished by this competitive bidding handicap. In addition, several class members were initially rehired but no longer work for Bowman;[6] their income was decreased during employment and they will be entitled to further back pay if Petitioners prevail. Finally, the reasons given by Bowman for rejection of many class members' renewed applications after the decree[7] strongly sug-

[4] Blacks whose applications for OTR positions Bowman discriminatorily rejected prior to January 1, 1972 (see Petitioners' brief at 10).

[5] See Bowman's Answers to Plaintiffs' Remand Interrogatories, filed May 1, 1975 (N.D. Ga., C.A. No. 15,086), #35 and #36, and Exhibits 5 and 34. Plaintiffs filed those remand interrogatories in the district court in connection with remand proceedings on issues other than that presented in this Court. Interrogatories 35-37 requested up-dated information as to each black OTR applicant denied a job prior to January 1, 1972, and granted re-application rights by the district court. Answer 36 and Exhibit 34 list all such Class 3 members and show which ones were hired; Answers 35, 36 and Exhibit 5 show the current status of such persons or when they were terminated.

[6] See n. 5, *supra.*

[7] Such reasons as "unable to verify experience" and "no tractor-trailer experience" are exactly the same pretexts Bowman used to deny jobs to plaintiff Lee, witnesses Harbor and McLaughlin, and other black OTR applicants in the first place. See Brief for Petitioners at 7-10.

gest continued post-decree discrimination. If any of these persons are adjudged entitled to reinstatement, their seniority status will depend on the outcome here.

Members of the plaintiff class affected by the retroactive seniority issue cannot fully protect their stake by filing a new lawsuit or pursuing the seniority issue from the remand proceedings to a renewed appeal to this Court.[8] Each day they work without their proper seniority, they suffer anew the consequences of past discrimination. No future decision of this Court in some later case can ever lift the yoke of employment discrimination from the days and years that will then have passed.

The suggestion raised by Bowman is one of standing, properly speaking, rather than mootness. The mootness decisions relied upon by Bowman, and similar recent decisions,[9] have involved changes in the factual setting which eliminated the present claim of one party, thus ending the "controversy" necessary for jurisdiction. Here, the underlying facts remain the same, and a number of class members have a present stake in the outcome that is "real and immediate," not "conjectural" or "hypothetical," *O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974). Since the case has been certified as a class action, there are presently before the court parties who have standing to present the retroactive seniority issue. This case is not an academic exercise, but a live controversy between adverse parties.

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[8] Under the Fifth Circuit's holding in this case, the district court would be constrained to deny the class members relief.

[9] See, for example, *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115 (1974).

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MOTION FOR LEAVE TO FILE BRIEF FOR LOCAL 862, UNITED AUTOMOBILE WORKERS, AS AMICUS CURIAE OUT OF TIME AND BRIEF AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF FOR LOCAL 862, UNITED AUTOMOBILE WORKERS, AS AMICUS CURIAE OUT OF TIME

Local 862, United Automobile Workers (herein "UAW") respectfully moves for leave to file the attached brief amicus curiae out of time in this case. All parties have furnished written consent to the filing of this amicus curiae brief. For the reasons set forth below, UAW could not file this brief before this time.

The interest of UAW in this case arises from the fact that it is petitioner in No. 74-1349, *Local 862, UAW* v. *Ford Motor Company and Dolores Marie Meadows,* presently pending before this Court on petition for writ of certiorari. In that case, a class action involving discriminatory refusals to hire on the basis of sex, the Court of Appeals for the Sixth Circuit found no statutory prohibition of retroactive seniority for the discriminatees. Unlike the Fifth Circuit's ruling in *Franks,* the Sixth Circuit declined to conclude that "reconciliation is impossible" between the seniority-layoff protection of the incumbent workers and the rights of a class of discriminatees hired under a district court's Title VII decree, *Meadows,* 510 F.2d 939, 949 (1975). But the Sixth Circuit then returned the issue to the District Court essentially without guidance for the task of reconciling the interests of these two groups of employees. UAW Local 862 filed a petition for writ of certiorari in No. 74-1349 requesting that concurrent review be granted with *Franks* for consideration of a viable alternative to the seniority-layoff impasse which the Fifth Circuit resolved against the discriminatees and which the Sixth Circuit was unable to resolve. This Court, however, did not rule upon UAW's petition during the 1974 term; when the term concluded without any ruling,[1] the filing of this brief amicus curiae became necessary, since the decision in *Franks* may well dispose of the issue raised by UAW in No. 74-1349. Moreover, none of the parties in *Franks* having discussed the remedial alternative

[1] By the time of the Court's conclusion of its 1974 term, the brief of petitioners, which we generally support, and concurrent with which Rule 42(2) requires the filing of an amicus brief, had long since been filed.

proffered by UAW in No. 74-1349, we request permission to present that alternative in the attached brief amicus curiae.

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BRIEF FOR LOCAL 862, UNITED AUTOMOBILE WORKERS, AS AMICUS CURIAE

INTRODUCTION

This case presents this Court's first major look at remedial problems arising under Title VII when courts seek to restore to discriminatees the job rights they

were denied by an employer's discriminatory hiring practices. Even in the best of circumstances, resolution of the competing equities between the discriminatees and the faultless incumbent workers, who have been earning their seniority rights on the job, presents challenging and novel problems. But they become the more difficult when they arise at a time of widespread unemployment and layoff.

The lower court opinion at bar, which denies retroactive seniority to the discriminatees, assumes that either the discriminatees or the incumbent employee group must bear the burden, by suffering layoff in favor of the other group. It assumes that normal seniority rules will apply and the only question is which group is to be placed on the lower rung of the ladder. However, there is an alternative which does not threaten the layoff either of incumbent workers or newly-hired discriminatees. That is the UAW-proposed "front pay" remedy which requires the wrongdoing employer to hold both groups harmless from layoff losses in work reduction situations. We urge in the Argument this Court's approval of that remedy.[1]

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[1] The narrow question presented here is whether the employees (discriminatees or incumbents) alone must suffer the burden of the present recession or whether a court may impose that burden upon a wrongdoing employer. Not before the Court is the entirely distinct question raised by *Watkins* v. *United Steelworkers of America*, 369 F. Supp. 1221 (E.D. La. 1974), reversed, — F.2d —, 10 FEP Cases 1297 (5th Cir., decided July 16, 1975) of whether a court may remedy an employer's past discrimination by providing layoff protection to employees who are members of a minority or class discriminated against but who have not specially and individually suffered such discrimination.

ARGUMENT

I

THIS COURT SHOULD REVERSE THE COURT OF APPEALS AND APPROVE THE FRONT-PAY SAVE-HARMLESS REMEDY WHICH PRESERVES THE FAIR SENIORITY CLAIMS OF BOTH THE TITLE VII DISCRIMINATEE AND THE INCUMBENT EMPLOYEE

For the apparent seniority rights impasse perceived by the Court of Appeals there is a solution which that court does not seem to have recognized: a remedy which requires the wrongdoing employer to protect from layoff losses both those against whom he discriminated and his incumbent work force.[2] Approval of that remedy is much to be desired, for this Court doubtless perceived last term during its consideration of *DeFunis* (416 U.S. 312) the difficult character of remedies for past discrimination which throw the burden either upon the wronged minority or upon other blameless citizens. If in the employment area there is a better solution, surely it should be preferred over one which is unjust either to the discriminatee or the incumbent worker.

Thus, if the discriminatees are hired without the same protection against losses in work reduction situations which they would have had but for their employment rejection, the key Congressional purpose to provide *full* Title VII remediation is frustrated. As the Conference Committee emphasized (see 118 Cong. Rec. 7168), section 706(g) is intended to assure "that persons aggrieved by the consequences and effects of

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[2] See Cooper and Sobol, "Seniority and Testing Under Fair Employment Laws," 82 Harv. L. Rev. 1598, 1678-1679 (1969); Blumrosen, "Seniority and Equal Employment Opportunity," 23 Rutgers L. Rev. 268, 305-07, 311-12 (1969); Note, "Last Hired, First Fired Layoffs and Title VII," 88 Harv. L. Rev. 1544, 1560 n. 68 (1975).

the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." Given this Court's definitive ruling in *Swann* (402 U.S. 1, 26) that to remedy school segregation there must be desegregation in actuality rather than mere theory, we cannot believe that in the employment area this Court would affirm the ruling below which may leave the employment discriminatee in actuality without job and pay.

On the other hand it would also be unjust if, after years spent in earning seniority on the job, the faultless incumbent employees were subjected to layoff in favor of discriminatees hired with seniority retroactive to the time when they were denied hiring. Only a year ago a majority of this Court declined to put the desegregation burden upon suburban school districts "not shown to have committed any constitutional violation." *Milliken* v. *Bradley,* 418 U.S. 717, 745. Considering that the incumbent employees are in no way at fault for the employer's Title VII violation, a remedy which corrects the employer's wrongdoing at the expense of those employees is unjust and unwise.

Accordingly, we urge for the Court's consideration a third and better option, which requires that following reinstatement of discriminatees the offending employer hold harmless against layoff losses both the discriminatees and his incumbent employees hired between the discriminatees' original rejection and their ultimate hiring. That remedy properly puts the full burden upon the wrongdoer rather than his victims or other unoffending employees. It is a familiar rule of law that the full remedial burden shall be on the offending party. Such seminal decisions as *Story Parchment* (282 U.S. 555) and *Bigelow* (327 U.S. 251) apply the rule as between the wrongdoer and his victim.[3] The rule equally applies as between the wrongdoer and third parties; where the wrongdoer has done intentional harm he is liable to third parties as much as to the immediately injured party, because "having departed from the social standard of conduct, he is liable for the harm which follows from his act" (Prosser, Law of Torts, 4th ed., p. 33). Thus there is every reason of equity and justice for placing the full burden upon the employer who violated Title VII, requiring him to protect both the discriminatees and his incumbent work force against layoff losses in periods of work reduction.

II

THE PROPOSED FRONT-PAY SAVE-HARMLESS REMEDY IS SIMPLE IN OPERATION AND ECONOMICALLY FEASIBLE

The suggested remedy is simple in operation. To the extent that discriminatees are hired with retroactive seniority protection against layoff losses, the incumbent work force (without a save-harmless remedy) would be prejudiced by becoming vulnerable to earlier layoffs. To prevent that prejudice, under the "front-pay" proposal the employer would be required to hold harmless against layoff losses that number of employees which is equivalent to the number of discriminatees

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[3] A similar policy applies to labor contracts. Where, for example, an employer agrees in its labor contract to have certain work done at the construction site by its bargaining unit employees and then agrees with another contractor to install pieces on which the promised work has already been performed elsewhere, the employer, if it honors the second contract must pay his unit workers for the work promised them but later given away. Cf. *Plumbers, Local 638* v. *NLRB,* — F.2d —, 89 LRRM 2769, 2777-78 (D.C. Cir., 1975).

hired with retroactive seniority. If the employees to be held harmless are the discriminatees themselves, then it is only they to whom the obligation would run. On the other hand, if through collective bargaining, self-selection, or otherwise, the protection is provided to the incumbent employees, or to a mix of discriminatees and incumbents, then the number of positions protected would remain equivalent to the number of discriminatees hired.

The facts of *Meadows* illustrate the operation of the remedy.[4] Some 35 or fewer discriminatees were hired in 1974 at the Ford Truck Plant in Kentucky under the District Court's decree. Retroactive seniority would yield those employees protective dates on and after November of 1969, when Ms. Meadows and other discriminatees were originally rejected for hiring. On that basis the following save-harmless conditions would apply:

(1) In a layoff situation reaching only the employees hired in recent months—after the 35 discriminatees were hired—there would be no save-harmless obligation, since none of those employees

[4] We illustrate the remedy with the facts in *Meadows* because the record in *Franks* is unclear on this point. In *Franks*, the District Court ordered that members of the relevant class be granted the right to reapply for Over the Road (OTR) jobs, and if found qualified, to be hired or given priority over other applicants (5 EPD ¶ 8497, p. 7371, see 495 F.2d 398, 413). The record does not show the number of applicants in the class who meet the Company's formal qualifications of age, fitness and experience. While petitioners believe that 127 members of the class meet these qualifications (Supreme Court Brief, p. 9, n. 9), counsel for petitioners informs us that the Company claims that not more than four or five of the applicants are qualified and are thus eligible to benefit from the District Court's order. Discovery is proceeding and the District Court has not yet resolved these conflicting claims.

were affected by the employer's discrimination or the grant of retroactive seniority to discriminatees;

(2) Similarly, in a layoff situation so severe as to reach further up the seniority ladder than 1969, when the discriminatees were wrongfully rejected, once again there would be no save-harmless obligation since no discriminatee or incumbent employee would have avoided layoff regardless of whether retroactive seniority is granted to the discriminatees;

(3) In a layoff situation of, for example, 35 persons which reaches into but not beyond the ranks of employees with seniority dates between the discriminatees' rejection of 1969 and their hiring in 1974, the first 35 persons (excluding persons hired more recently than the discriminatees) affected would be held harmless.[5] If the remedy should go to the 35 discriminatees, they are in effect given the wage and fringe benefit protection they would have had if they had not been wrongfully rejected when they applied in 1969. If it goes to 35 incumbents, they in turn are protected against any loss caused by the grant of retroactive seniority to the discriminatees. In other words, in any contingency the discriminatees are restored fully to the job protection they would have had but for the employer's violation of their rights, without prejudicing or diminishing the earned layoff seniority of the incumbent work force.

[5] The "front-pay" proposal here is concerned with wage and fringe benefits and not the work itself. As to the latter, we show below that employers generally find work for employees whom they must pay. However, if reduction in the work force may actually become necessary, then many employees from either the "discriminatee" group or the "incumbent work force" group may opt for layoff with pay. If further employees must be selected for layoff, other equitable arrangements can be made.

Moreover, for three separate reasons, the economic consequences are modest for the employer required to provide a hold harmless remedy. First, because the number of discriminatees hired in Title VII cases is small; second, because employers have generally proved able to find productive work for employees whom they must pay; and third, because under the unemployment compensation system and corporate tax principles, only a small portion of save harmless pay represents a profit loss for the employer.

1. *Small numbers.* In *Franks* the number of affected discriminatees may be as low as four in a company with about 500 over the road drivers.[6] In *Meadows* the number of discriminatees hired under the Title VII decree is fewer than 35 in a plant of one thousand production workers. Statistics compiled by the federal Equal Employment Opportunity Commission show that EEOC has found reasonable cause to believe that hiring discrimination has been proven against only an infinitesimal proportion of the black and female work force in each of the last six years.[7] National and auto industry statistics compiled by EEOC show the very small proportion of the total work force filled by blacks or women hired in recent years, and thus make clear the small probable impact on the employers of a save harmless remedy in discriminatee situations. The EEOC nationwide tables (*infra,* Appendix B) show that only 2.8 percent of the 1974 work force is composed of blacks hired since 1969, and only 8.1 percent represents women hired

[6] See p. 6, n. 4, *supra.*

[7] In 1974, for example, such findings were made with respect to the charges of hiring discrimination of only 47 blacks and 54 women, 0.00127% and 0.00043% respectively of the blacks and women in the workforce (see Appendix A *infra*).

since that year.[8] The data for employment in motor vehicle production (Appendix C) show that only 5.9 percent and 6.1 percent of the 1974 work force are blacks and women respectively hired since 1969.[9] It is clear that a save harmless obligation arising from and in proportion to an employer's recent hiring of minority group employees, ordinarily would represent only a small additional obligation for the employer who vio-

[8] Proportion of new black and women hires (between 1969 and 1974) to total 1974 employment in all industries (computed from Appendix B):

Job Category	Blacks	Women
Total Employment	2.8%	8.1%
White Collar	2.4	9.9
Office Managers	1.8	5.6
Professional	1.1	6.6
Technical	2.7	10.2
Sales Workers	2.5	15.4
Office and Clerical	3.3	10.7
Blue-Collar	3.1	4.7
Craft	2.6	1.7
Operatives	4.0	5.7
Laborers	1.4	6.8
Service Workers	4.1	16.8

[9] Proportion of new black and women hires (between 1969 and 1974) to total 1974 employment in motor vehicle industry (computed from Appendix C):

Job Category	Blacks	Women
Total Employment	5.9%	6.1%
White-Collar	3.9	5.0
Office Managers	3.9	1.5
Professionals	2.8	4.8
Technical	2.7	3.2
Sales Workers	1.0	0.6
Office and Clerical	5.5	11.0
Blue-Collar	6.3	6.5
Craft	3.3	0.2
Operatives	7.5	8.0
Laborers	3.1	7.9
Service Workers	7.5	3.8

lated Title VII since he would be providing the protection only for the number of persons equal to the recently hired blacks and women against whom he had discriminated.

2. *Work opportunities.* It is also clear that an employer required to save employees harmless from layoff loss will often not have to provide them any front-pay but will be able to produce productive work for them. The common observation that employers will find work for those whom they must pay is confirmed by experience. For instance, employers faced with the possibility of layoffs, have often retrained or reassigned their employees for other positions. Work previously contracted out or "shunned" has been done by the employer's own employees.[10] Substantial overtime work—which has persisted even during the current recession [11]—can be reassigned to the employees who would otherwise be laid off. Moreover, where under UAW contracts [12] employers have been required to pay a minimum of four hours to an employee called in from home, the experience has been that the employee is given a full four hours work by the assignment of work which might otherwise be deferred. It seems clear, therefore, that even for the small number of workers whom the wrongdoing employer has to save harmless, he can minimize the necessity of paying wages without receiving labor.

3. *Small profits impact.* Finally, even if some front-pay to employees on layoff results, it is significant that

[10] See articles in Appendices D, E and F *infra*.

[11] Appendix G *infra* contains Bureau of Labor statistics which show that substantial overtime has continued despite the recession economy of 1974-1975.

[12] For example, 1973 UAW-General Motors National Agreement, ¶ 80.

the employer bears only a small portion of each wage dollar he must pay. In the absence of that front-pay obligation, the worker would be drawing unemployment compensation borne in part by the employer. In times of heavy unemployment, the employer must pay substantially increased amounts to the state unemployment compensation fund, which makes the employer's "experience rate" a significant factor in his payment obligation.[13] Moreover, any hold harmless wages are also deductible by the employer from his corporate income taxes, so that only about one-half of such payments may represent any loss of profits. Thus the monetary consequences of a save harmless remedy are not severe. The wrongdoing employer's actual burden is less than one-half of what he must pay and society at large pays a portion in loss of tax revenues due to increased employer wage deductions. The employer, of course, can also raise his prices. While we do not welcome lower tax revenues or higher prices, that is surely a more just result, for instead of putting the onus of legal redress and social reform on innocent individual workers and their families, the burden is shared between the wrongdoing employers and the society which has so long practiced and tolerated employment discrimination.

[13] While the formulas vary, all states have systems of levying unemployment insurance tax in relation to an individual employer's experience with unemployment. The most popular system is the "reserve-ratio system" where the employer's account is credited for contributions and against which benefits paid to former employees are charged. The reserve-ratio, which is the resulting balance to the employer's payroll, then determines the employer's tax rate. The lower the ratio (i.e. high unemployment experience), the higher tax rate and vice-versa. (*e.g.*, Ky. Rev. Stat. § 341.530; see also *California Department of Human Resources Develop.* v. *Java*, 402 U.S. 121, 126 (1971) concerning California's unemployment insurance system).

CONCLUSION

For the reasons stated, it is submitted that the lower court was in error in assuming that either Title VII discriminatees or the incumbent employee group must bear the burden of layoffs. The Court should affirm the propriety of a front-pay remedy which places the burden on the wrongdoing employer and which holds harmless from economic prejudice and layoff loss both the wronged discriminatees and the incumbent workers who have been earning their seniority protection on the job.

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APPENDIX

APPENDIX A

Number of Hiring Discrimination Charges by Blacks and Women Where EEOC Found Reasonable Cause, and Blacks and Women in Workforce, 1969-1974 •

	NUMBER OF HIRING DISCRIMINATION CHARGES WHERE EEOC REASONABLE CAUSE FINDING		PERSONS IN WORKFORCE	
	Blacks	Women	Blacks	Women
1969	171	46	2,720,503	9,686,006
1970	176	60	2,965,103	9,969,006
1971	222	79	2,868,375	10,323,287
1972	214	106	3,241,558	11,627,071
1973	138	104	3,629,083	12,588,822
1974	47	54	3,684,768	12,429,808

• SOURCE: July 31, 1975 letter from Alphonso Johnson, Chief, Systems and Control Division, EEOC.

APPENDIX B

1969
PAGE 58 SENSITIVE INFORMATION—UNAUTHORIZED DISCLOSURE PROHIBITED
STATE NO. UNITS # 52,424

		TOT EMPL	WHITE COLL	OFFS MGRS	PROF	TECH	SALES WRKS	OFFS CLER	BLUE COLL	CRAFT	OPER	LABOR	SERV WRKS
ALL	T	28,598,713	13,532,255	2,545,601	2,338,821	1,240,602	2,472,974	4,934,257	13,205,154	3,886,454	6,713,650	2,685,050	1,861,304
ALL	M	18,912,707	7,695,354	2,286,971	1,798,192	930,493	1,472,356	1,207,342	10,266,390	3,622,217	4,762,856	1,881,317	953,906
ALL	F	9,686,006	5,836,901	258,630	540,629	310,109	1,000,618	3,726,915	2,938,764	264,237	1,950,794	723,733	910,341
ANG	T	24,700,001	12,606,795	2,471,921	2,220,723	1,130,567	2,310,713	4,472,871	10,853,037	3,558,323	5,481,095	1,813,619	1,240,169
ANG	M	16,390,253	7,297,815	2,227,372	1,723,007	870,073	1,388,382	1,088,981	8,480,085	3,333,877	3,874,119	1,272,089	612,353
ANG	F	8,309,748	5,308,980	244,549	497,716	260,494	922,331	3,383,890	2,372,952	224,446	1,606,976	541,530	627,816
NEG	T	2,720,503	555,902	38,090	49,652	69,432	98,868	299,860	1,664,015	194,636	902,533	566,846	500,586
NEG	M	1,740,426	206,141	29,027	25,299	31,490	49,288	71,037	1,272,266	170,350	658,920	442,996	262,019
NEG	F	980,077	349,761	9,063	24,353	37,942	49,580	228,823	391,749	24,206	243,613	123,850	238,567
SSA	T	912,298	229,828	21,358	23,608	24,659	45,269	114,934	586,065	103,466	285,250	197,349	96,405
SSA	M	613,769	113,175	18,407	17,282	17,602	25,102	34,782	437,935	90,588	200,530	146,817	62,659
SSA	F	298,529	116,653	2,951	6,326	7,057	20,167	80,152	148,130	12,878	84,720	50,532	33,746
ORI	T	185,118	113,890	9,741	42,101	13,311	11,408	37,329	53,084	17,667	21,571	13,846	18,144
ORI	M	115,693	65,485	8,391	30,753	9,389	6,769	10,183	39,153	16,246	13,833	9,074	11,055
ORI	F	69,425	48,405	1,350	11,348	3,922	4,639	27,146	13,931	1,421	7,738	4,772	7,089
AMI	T	80,793	25,840	4,491	2,737	2,633	6,716	9,263	48,953	12,362	23,201	13,390	6,000
AMI	M	52,566	12,738	3,774	1,851	1,939	2,815	2,359	36,951	11,156	15,454	10,341	2,877
AMI	F	28,227	13,102	717	886	694	3,901	6,904	12,002	1,206	7,747	3,049	3,123

PAGE 1 SENSITIVE INFORMATION—UNAUTHORIZED DISCLOSURE PROHIBITED
1974 EEO 1 REPORT NATIONWIDE SUMMARY
35,796 COMPANIES

ALL	T	33,865,626	16,139,519	3,450,041	2,502,069	1,513,454	3,259,063	5,414,892	15,141,662	4,419,692	7,715,092	3,006,878	2,584,445
ALL	M	21,435,818	8,710,166	2,998,273	1,796,543	1,048,231	1,757,138	1,109,981	11,484,559	4,080,980	5,325,884	2,077,695	1,241,093
ALL	F	12,429,808	7,429,353	451,768	705,526	465,223	1,501,925	4,304,911	3,657,103	338,712	2,389,208	929,183	1,343,352
WHITE	T	28,343,506	14,571,346	3,272,384	2,321,508	1,337,385	2,958,069	4,682,000	11,996,947	3,910,465	6,011,289	2,075,193	1,775,213
WHITE	M	18,123,927	8,065,782	2,858,908	1,688,268	954,728	1,613,373	950,505	9,232,234	3,637,703	4,185,088	1,409,443	825,911
WHITE	F	10,219,579	6,505,564	413,476	633,240	382,657	1,344,696	3,731,495	2,764,713	272,762	1,826,201	665,750	949,302
MIN	T	5,522,120	1,568,173	177,657	180,561	176,069	300,994	732,892	3,144,715	509,227	1,703,803	931,685	809,232
MIN	M	3,311,891	644,384	139,365	108,275	93,503	143,765	159,476	2,252,325	443,277	1,140,796	668,252	415,182
MIN	F	2,210,229	923,789	38,292	72,286	82,566	157,229	573,416	892,390	65,950	563,007	263,433	394,050
BLACK	T	3,684,768	946,196	99,106	77,980	110,123	180,155	470,832	2,131,171	308,541	1,212,599	610,031	607,401
BLACK	M	2,163,147	340,831	74,069	40,278	49,200	81,972	95,312	1,527,550	266,634	818,292	442,624	294,766
BLACK	F	1,521,621	605,365	25,037	37,702	60,923	98,183	303,520	603,621	41,907	394,307	167,407	312,635
SSA	T	1,450,378	402,745	52,038	37,159	41,144	89,546	182,058	883,306	167,261	426,601	289,444	164,327
SSA	M	931,373	190,716	44,252	25,989	27,613	46,244	46,618	639,766	147,828	286,645	205,293	100,891
SSA	F	519,005	212,029	8,586	11,170	13,531	43,302	135,440	243,540	19,433	139,956	84,151	63,436
ASIAN	T	262,606	172,509	15,751	60,015	20,130	19,939	56,674	63,256	16,352	31,835	15,069	26,841
ASIAN	M	141,023	90,099	12,691	38,330	13,494	10,981	14,603	36,398	13,085	15,010	8,303	14,526
ASIAN	F	121,583	82,410	3,060	21,685	6,636	8,958	42,071	26,858	3,267	16,825	6,766	12,315
AMIND	T	124,368	46,723	9,962	5,407	4,672	11,354	15,328	66,982	17,073	32,768	17,141	10,663
AMIND	M	76,348	22,738	8,353	3,678	3,196	4,560	2,943	48,611	15,730	20,849	12,032	4,999
AMIND	F	48,020	23,985	1,609	1,729	1,476	6,786	12,385	18,371	1,343	11,919	5,109	5,664

APPENDIX C

1969
PAGE 223 SENSITIVE INFORMATION—UNAUTHORIZED DISCLOSURE PROHIBITED
EEOC EEO-1 NATIONWIDE SIC 3 DIGIT
NO. UNITS # 752 SIC — 371 MOTOR VEHICLES & EQUIPMENT

		TOT EMPL	WHITE COLL	OFFS MGRS	PROF	TECH	SALES WRKS	OFFS CLER	BLUE COLL	CRAFT	OPER	LABOR	SERV WRKS
ALL	T	720,244	159,729	53,974	26,635	21,234	4,338	53,548	543,046	94,881	403,755	48,410	17,469
ALL	M	644,603	129,265	53,573	25,916	20,283	4,150	25,343	498,965	94,111	366,123	38,731	16,373
ALL	F	75,641	30,464	401	719	951	188	28,205	44,081	770	37,632	5,679	1,096
ANG	T	599,008	154,557	52,638	26,121	20,677	4,316	50,805	431,940	89,857	307,718	34,365	12,511
ANG	M	532,581	125,336	52,244	25,444	19,767	4,129	23,752	395,477	89,155	276,828	29,494	11,768
ANG	F	66,427	29,221	394	677	910	187	27,053	36,463	702	30,890	4,871	743
NEG	T	104,392	3,981	1,089	263	392	6	2,231	95,844	3,788	83,702	8,354	4,567
NEG	M	96,725	2,970	1,084	228	356	5	1,297	89,529	3,745	77,902	7,802	4,226
NEG	F	7,667	1,011	5	35	36	1	934	6,315	43	5,720	552	341
SSA	T	14,892	714	174	62	83	13	302	13,824	1,006	11,253	1,565	354
SSA	M	13,472	544	172	59	80	13	220	12,583	982	10,282	1,319	345
SSA	F	1,420	170	2	3	3		162	1,241	24	971	246	9
ORI	T	935	358	27	177	62	3	89	566	65	463	38	11
ORI	M	865	316	27	174	60	3	52	539	64	438	37	10
ORI	F	70	42		3	2		37	27	1	25	1	1
AMI	T	1,017	119	46	12	20		41	872	165	619	88	26
AMI	M	960	99	46	11	20		22	837	165	593	79	24
AMI	F	57	20		1			19	35		26	9	2

PAGE 182 SENSITIVE INFORMATION—UNAUTHORIZED DISCLOSURE PROHIBITED
1974 EEO-1 REPORT SUMMARY OF NATIONWIDE INDUSTRIES
1,153—UNITS 317—EMPLOYERS SIC—371 MOTOR VEHICLES AND EQUIPMENT

ALL	T	1,075,894	243,251	92,892	50,308	25,983	6,681	67,307	806,397	157,022	599,118	50,257	26,246
ALL	M	935,084	200,737	91,101	47,258	24,204	6,454	31,720	710,201	155,994	513,592	40,615	24,146
ALL	F	140,810	42,514	1,791	3,130	1,779	227	35,587	96,196	1,028	85,526	9,642	2,100
WHITE	T	876,129	226,098	87,134	47,880	24,469	6,526	60,089	631,133	145,061	448,986	37,086	18,898
WHITE	M	766,392	187,945	85,597	45,078	22,866	6,305	28,099	560,966	144,208	387,041	29,717	17,481
WHITE	F	109,737	38,153	1,537	2,802	1,603	221	31,990	70,167	853	61,945	7,369	1,417
MIN	T	199,765	17,153	5,758	2,508	1,514	155	7,218	175,264	11,961	150,132	13,171	7,348
MIN	M	168,692	12,792	5,504	2,180	1,338	149	3,621	149,235	11,786	126,551	10,898	6,665
MIN	F	31,073	4,361	254	328	176	6	3,597	26,029	175	23,581	2,273	683
BLACK	T	167,429	13,535	4,741	1,672	1,093	74	5,955	142,353	9,012	128,448	9,893	6,541
BLACK	M	140,622	9,927	4,514	1,392	958	70	2,993	124,803	8,906	107,305	8,592	5,892
BLACK	F	26,807	3,608	227	280	135	4	2,962	22,550	106	21,143	1,301	649
SSA	T	28,169	2,232	669	311	242	60	950	25,196	2,376	19,740	3,080	741
SSA	M	24,622	1,766	659	298	226	58	525	22,144	2,322	17,654	2,168	712
SSA	F	3,547	466	10	13	16	2	425	3,052	54	2,086	912	29
ASIAN	T	2,255	913	115	465	130	11	192	1,318	206	1,003	109	24
ASIAN	M	1,771	734	109	437	114	11	63	1,016	196	758	62	21
ASIAN	F	484	179	6	28	16	0	129	302	10	245	47	3
AMIND	T	1,912	473	233	60	49	10	121	1,397	367	941	89	42
AMIND	M	1,677	365	222	53	40	10	40	1,272	362	834	76	40
AMIND	F	235	108	11	7	9	0	81	125	5	107	13	2

APPENDIX D

Business Week, June 9, 1975, pp. 25-26

UNIONS

WHEN WORKERS HIT THE STREET—TO SELL

During a recession, the traditional ways to cut inventories and prevent layoffs include such devices as shortening the work week or cutting pay. Last week, Wisconsin-based Kimberly-Clark Corp. tried a different approach: It took 75 workers off production lines and sent them out into the street to sell the consumer paper goods, such as Kleenex tissues and towels and Kimbies diapers, that they produce.

For production workers, it was a chance to discover a new talent

The move, made with the approval of Local 482 of the United Paperworkers—and done only with volunteers—resulted in additional sales of some $250,000. But, says the company's general sales manager, W. M. Bray, who coordinated the effort, "On the numbers alone, we probably wouldn't have done it." An innovator in employee relations, Kimberly-Clark tried the idea for several reasons:

- It allowed a blitz attack on 1,461 stores in northern Wisconsin and upper Michigan that are not covered by Kimberly-Clark's usual sales routes. Hitting these seasonal stores just before the start of their peak tourist season resulted in purchases of a broader range of products by store managers.

- It gave mill workers a greater appreciation for the sales job and for the value of producing quality goods. For example, Sherald Laabs, secretary of the Paperworkers local, who participated in the program, says: "When we pack boxes, we don't necessarily put all the labels the same way." After several days of repacking cases, box by box, for better display effect, Laabs promises: "Now, I'll try to get them loaded the same way in the plant."

■ It saved Kimberly-Clark the cost of hiring temporary helpers to staff a big promotional campaign already scheduled for late May.

■ For production workers, it was a chance to discover a new talent. Some workers who showed skill and interest in sales will be groomed for permanent sales jobs, says John F. Gillen, regional sales manager.

Though Kimberly-Clark developed this program on its own, it is not an entirely new idea. International Business Machines Corp. has for years retrained production and administrative employees for sales and engineering jobs. Under the lifetime employment system in Japan, many major companies use such schemes as converting factory workers to salesmen to avoid layoffs. For example, Toyo Kogyo Co., which has put 2,500 office and factory workers on eight-month selling assignments, has seen sales jump some 30% or 40% since January. The company builds the Mazda car.

In Kimberly-Clark's case, the program was spurred by a need to cut inventories rather than the fear of imminent, layoffs. Adds President Harry J. Sheerin, "It fit in with our philosophy that the best motivated people are involved, aware people."

Once the idea was approved, it took about three weeks to implement. Union officials, finding no conflict with provisions in labor contracts, backed the plan. "We think we're making a good product, and so we're out helping push our product," says Jack Callaway, the local union president.

Eye contact. After a cram course in salesmanship, the 75 workers who volunteered for sales went to their assigned areas on Monday, May 19. Forty-six workers called on retail stores in Michigan and Wisconsin. The new salesmen received promises of orders from all stores visited and commitments from about 75% of them.

Another 29 volunteers helped conduct truckload sales and set up in-store promotional displays at Chicago-area Mont-

gomery Ward stores. Even before advertising began, some stores were selling out their truckloads and ordering more. "It was just amazing," says Sherald Laabs, who helped set up a display. "As fast as we could set up the boxes, they were being taken away."

Kimberly-Clark says it will repeat the one-week program in the future "if conditions are right." Says Sheerin: "This was meant to take care of a short-term challenge. We don't know if this will turn out to be a financial bonanza, but it has caused a very positive reaction among all our employees."

APPENDIX E

The Wall Street Journal, February 6, 1969, p. 1

Keeping Busy

FIRMS TRY A VARIETY OF TACTICS TO AVOID LAYOFFS IN SLOW TIMES

LOCKHEED LENDS ENGINEERS TO OTHER EMPLOYERS; SOME MACHINISTS TURN PAINTER

Furloughed Men May Vanish

By RALPH E. WINTER

Staff Reporter of THE WALL STREET JOURNAL

What does a company do with employes it has no work for?

It may retrain them for different jobs or transfer them to another office, factory or production line. It may take on business it wouldn't ordinarily handle just to give the employes something to do. It may even invent tasks to keep the workers busy or lend them to another company, until business picks up enough for them to resume their old jobs.

Indeed, say executives, about the only thing a savvy company *won't* do with temporarily unneeded employes these days is lay them off. Main reason: In today's tight labor market, men laid off are almost sure to find other jobs rather than sit around waiting for recall.

At best, companies say, this means the firm that lays men off will lose whatever it has spent to train them—which, in the case of skilled workers, is likely to be quite a lot. "We figure we'd be throwing $25,000 out the window if we laid off a tool-and-die maker," says John Bohannon, industrial relations director of Stanley Works, a New Britain, Conn., machinery maker.

Buying Repair Work

At worst, executives add, a company may be unable to find replacements for men it lays off when time comes to expand production again. "Good thing we didn't lay off anyone last summer, because we'd never have gotten the men we're using now," says Jacob Kamm, executive vice president of American Ship Building Co., Lorain, Ohio. Prior to 1968, his firm had laid off half its repair crews during the spring and summer ore-shipping season, when repair work is scarce. Last year it managed to avoid layoffs—by buying a damaged 11,500-ton ore vessel and setting its crew to work overhauling the ship's ripped bottom. American Ship plans to operate the vessel when the ore-shipping season on the Great Lakes reopens.

Such attitudes are reflected in the national layoff rate, which last year dropped to a monthly average of 1.2 furloughs for each 100 U.S. manufacturing employes. That was down 14% from the 1967 monthly average and 33% below the layoff rate five years earlier.

Layoffs, of course, are likely to rise again if a nationwide economic slowdown or recession erodes employers' confidence that any workers not needed at the moment will be needed again soon. But many companies vow they will continue to try to avoid layoffs as much as possible even during a recession and predict that the layoff rate will not climb as much in any future downturn as in past downturns of comparable severity.

The reluctance to write off costs of training skilled employes who might vanish if they were laid off is one reason. Another is a spreading conviction that frequent heavy layoffs damage a company's reputation—in its plant communities and among workers it might want to hire in the future.

Loans From Lockheed

Lockheed Aircraft Co., for one, believes that "if we don't do a better job of offering continuous employment, engineers just aren't going to be interested in coming to work for us," says Kay Kiddoo. He recently was named to the new job of manpower coordinator, in which his chief task is helping Lockheed divisions find ways to avoid layoffs.

To that end, Lockheed last year set up a plan called LEND (Lockheed Engineers for National Deployment). Under it, Lockheed has lent 125 engineers to employers ranging from the Philco-Ford subsidiary of Ford Motor Co. to Stanford University until there was work for them at Lockheed again. The company last year also lent several hundred tool-and-die makers to Avco Corp. and Norair division of Northrop Corp., calling them back later to work on Lockheed's program to build the giant "air bus" jetliner. Lockheed charges companies that borrow its employes only enough to pay their wages and fringe benefits while they are out on loan and keeps the employes on its own payroll.

Whatever comes of such plans in the future, employers' current attitude contrasts sharply with the recent past. Periodic layoffs—during seasonably slack times or the intervals between completion of a contract and the start of work on a new one—were an accepted part of life in factory towns even during generally prosperous times. (So much so that one joke had a worker's son remarking: "I go to school five days, then I'm laid off for the weekend.")

The Makework Strategy

The change is measured most dramatically by the willingness of many companies to dig up minor assignments if they can't think of any other way to keep valued employes on the payroll. Most companies hate to admit this practice publicly for fear of arousing shareholders' wrath, but there's no doubt it is growing.

Danly Machine Specialties Inc. of Chicago, for instance, last summer put eight men to work for two months assembling a catalog—at the full pay they normally draw for the highly skilled task of wiring control panels for forming presses. A Midwest transportation-equipment maker similarly assigned a group of highly paid machinists to paint their machines during a slack period, and an aerospace company told 40 of its engineers to pass their time "updating manuals" until the company could put them to work on a new contract.

A more productive—but still expensive—way to avert layoffs is to take on work a company has shunned in the past, for the specific purpose of keeping employes busy at their normal jobs during what otherwise would be slow periods. This method is particularly favored by companies in highly seasonal or cyclical businesses.

Perini Corp., a Framingham, Mass., construction company, for instance, says it bids nowadays with "sharpened pencil" for jobs involving considerable inside work that can be done during the winter, when it used to lay off many of its crews. It adds that it has spent a good deal of money to buy wood framing and polyethylene sheets to shield some construction sites from winter storms so that its crews can continue working during the cold months. The work could be done more cheaply in the busy spring and summer seasons. Perini says—but it might not be able to find workers then if it let its experienced men go during the winter.

The steel industry used similar tactics to keep many of its skilled employes busy last summer and fall during a production slump brought on by customer inventory-cutting (the customers had built up heavy stockpiles as a hedge against a strike that had been threatened for midsummer but never came off). A Republic Steel Corp. district manager says he held layoffs to half the number experienced in comparable downturns in the past, largely by having his own crews perform maintenance work the company usually farms out to independent contractors.

Arguments Inside the Industry

Such policies "caused some pretty heated arguments last fall" within the industry, says an administrator for another steel company. "The cost-control people," he says, "wanted more men laid off," but "the operating people said if we laid off skilled men we wouldn't be able to get them back." At most companies, the operating men won, but in some cases it was a costly victory. Republic indicated fourth-quarter profits dropped 48% from the 1967 period—partly, the company said, because of the cost of "retaining on the payroll many skilled employes temporarily not needed" in normal operations.

Putting temporarily idle workers into training programs to upgrade their skills or teach them new ones is a particularly popular way to avoid layoffs. Such programs are not confined to workers who already have reached the skilled category when layoffs threaten. Marathon Oil Co. has kept half a dozen roustabouts no longer needed in its Yates Field in Texas by retraining them to be computer operators.

Arthur G. McKee & Co., Cleveland-based engineering firm, has developed several training programs specifically so that "in slack times we can keep good people on and have them studying through seminars and technical reading to further their skills," says E. W. Moerhart, vice president. At one point last year, when several expected orders were postponed McKee had 10% of its Cleveland staff in such training programs, he says.

Engineers as Planners

Aerojet-General Corp. of El Monte, Calif., has developed a variation of this strategy. Temporarily idle engineers develop new business for the company while they also prepare themselves to work on that new business if it develops. Aerojet assigns especially talented engineers whose

production projects are being wound up to an Operations Systems Analysis Group that draws up long-range plans and does preliminary work on new projects that may eventually develop into paying programs. Engineers in the group also function as a "skills bank" that other Aerojet divisions can call on for help in tackling special problems.

Intracompany transfers of workers no longer needed in their present locations are one of the most expensive ways of avoiding layoffs or dismissals. But companies nevertheless are trying this strategy, too—and not only for especially skilled people. When Avco Delta Corp., financial subsidiary of Avco Corp., moved its headquarters from London, Ontario, to Cleveland a few months ago, it transferred at company expense 175 employes, including some 100 secretaries and clerical workers.

Hiring new secretaries and clerks in Cleveland would have been cheaper, but an Avco Delta official indicates the company was afraid it wouldn't have been able to get as many as it needed. "Good secretaries are extremely difficult to find now, and even competent clerical help familiar with office routine isn't easy to get," he says.

Diversification Helps

Shifting employes from one operation to another is easiest for companies that have diversified widely—and some companies say they have diversified at least partly to avoid mass layoffs. Raytheon Co., Lexington, Mass., had to make extremely heavy layoffs five years ago when its defense work was heavily concentrated in two missile systems. Since then the company has worked hard to land many different types of projects from different Government agencies, and it now works on radar and sonar gear, space technology, data-handling and communications-systems projects, among others. One result: It recently absorbed in other projects all employes displaced when one

of its Boston-area plants completed a major contract, a spokesman reports.

Some of the companies most eager to avoid layoffs say the chief reason is restrictive union rules that would force them to lay off employes they wanted to keep, while keeping workers they would prefer to lay off, if they did resort to furloughs. "Because of union agreements that rigidly enforce seniority, we have to lay off the younger, engineering-trained men and retain the older guys who have experience but often lack versatility for new types of work," grumbles an official of a Midwestern railroad. The result, he says, is that "all of us in the railroad industry are trying to avoid layoffs."

Much as such union rules may displease companies, the new management stress on avoiding layoffs naturally pleases unions. "It's a very healthy thing," says P. L. Siemiller, president of the million-member International Association of Machinists.

APPENDIX F

The Wall Street Journal, July 31, 1975, p. 1

Manning the Paint Buckets

Dow Chemical Co. in Midland, Mich., early this year guaranteed employes at major plants that they wouldn't be laid off if they agreed to reassignment to construction and maintenance projects when they weren't needed at their regular jobs. The unions agreed to that arrangement, and Dow employes picked up hammers, wrenches and paint buckets to handle expansion, modernization and repair work that is normally contracted out to other companies. Even some white-collar workers participated. "It worked like a charm," a Dow spokesman says. As demand picked up, employes went back to their regular jobs.

APPENDIX G

Production Worker Employment and Average Overtime Hours in Manufacturing and Motor Vehicle

January 1974-June 1975

	Manufacturing		Auto	
	Production Worker Employment	Average Overtime Hours	Production Worker Employment	Average Overtime Hours
	(000)		(000)	
1974				
January	14,691	3.3	681.9	3.2
February	14,598	3.3	623.5	3.1
March	14,582	3.4	603.3	3.2
April	14,629	2.7	661.3	1.5
May	14,665	3.3	661.9	3.4
June	14,903	3.5	679.1	3.4
July	14,605	3.3	636.3	4.2
August	14,826	3.5	636.8	4.0
September	14,913	3.6	706.9	4.3
October	14,702	3.3	702.0	4.8
November	14,351	2.9	683.3	2.9
December	13,814	2.8	630.0	2.3
Average	14,607	3.2	658.6	3.4
1975				
January	13,225	2.2	566.2	1.0
February	12,851	2.2	508.5	1.2
March	12,747	2.2	539.9	1.2
April	12,732	2.2	554.1	1.6
May	12,796	2.2		
June	12,996	2.4		

NOTE: Data not seasonally adjusted.

SOURCE: Bureau of Labor Statistics.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 74-728

HAROLD FRANKS AND JOHNNIE LEE,
Petitioners,

vs.

BOWMAN TRANSPORTATION, INC., ET. AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE.

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§ 8(d) 12, 13

§ 10(c) 12, 13

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BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE.

INTEREST OF THE AMICUS.*

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over three thousand seven hundred (3,700) state and local chambers of commerce and professional and trade associations, a direct business membership in excess of fifty-two thousand (52,000) and an un-

*Consents of all parties to the Chamber's filing of the instant brief previously have been filed with the Court. All parties have been re-contacted and none oppose the Chamber's filing of its brief at this time, subject to the Respondent Union's sole condition that the filing will not result in postponement of oral argument or delay the Court's subsequent consideration of this case.

derlying membership of approximately five million (5,000,000) business firms and individuals. It is the largest association of business and professional organizations in the United States.

In order to represent its members' views in areas which significantly affect their rights and interests and to render such assistance as it can to this Court's deliberations in such areas, the Chamber has frequently participated as *amicus curiae* before this Court in cases raising significant Title VII** and related questions. *E.g., Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971); *Geduldig* v. *Aiello*, 417 U. S. 484 (1974); *DeFunis* v. *Odegaard*, 416 U. S. 312 (1974); *Emporium Capwell Co.* v. *Western Addition Community Organization*, ... U. S. ....., 43 USLW 4214 (1975); *Albemarle Paper Co.* v. *Moody*, ... U. S. ....., 43 USLW 4880 (1975); *Liberty Mutual Insurance Company* v. *Wetzel*, No. 74-1245, *petition for writ of certiorari granted.*

The issue presented by this case—whether Title VII prohibits granting a class of minority job applicants, initially denied employment because of their race, artificial seniority rights over those seniority rights of incumbent white employees—is a matter of significant concern for the Chamber and its members.

In reliance on § 703(h) of the Act, the Fifth Circuit below held that Title VII does not permit the extension of artificial, retroactive seniority rights as a remedy for an employer's past failure to hire a class of persons because of their race. The primary burden of such an award falls not upon the employer but upon incumbent, innocent employees, destroying their legitimate rights and expectations secured through collective bargaining. Where, as here, with respect to the over-the-road truck driver positions at issue, a seniority system is company-wide, "bumping down" experienced incumbent white employees in favor of minority applicants would be inequitable and contrary to the Con-

** Title VII of the Civil Rights Act of 1964, as amended, 42 USC [Supp. II, 1972] § 2000e, *et seq.*; hereinafter referred to as "Title VII" or the "Act".

gressional intent to preserve seniority rights from erosion under Title VII. While the Chamber recognizes the need to establish remedies which serve the dual objectives of preventing and remedying employment discrimination, it is particularly concerned with the propriety of a remedy which redresses past discrimination against minorities by imposing equivalent or even greater burdens on other employees.

Since many members of the Chamber are parties to collective bargaining agreements containing seniority provisions, those members are vitally concerned with the effect of any decision herein on the stability of their collective bargaining relationships. The Chamber thus desires to submit its views to aid this Court in reaching a resolution of the important issue presented in this case.

SUMMARY OF ARGUMENT.

In Title VII Congress established a national priority to open the doors of equal employment opportunity and put an end to discriminatory hiring and employment practices in the future. However, the legislative history underlying § 703(h) of Title VII establishes that Congress did not intend that discrimination be remedied by destroying the earned seniority rights of incumbent employees. Thus, one of the reasons opponents of the Act sought to prevent its passage was their expressed fears that Title VII would destroy seniority rights. To alleviate this fear, the proponents made it clear that the Act would in no way—either in substance or by way of remedy—have such an effect. The artificial retroactive seniority sought by Petitioners for a class of job applicants, previously rejected because of their race, contravenes this Congressional desire.

Further, an award of artificial retroactive seniority imposes retribution for past discrimination, not primarily on the wrongdoer, but upon innocent employees, depriving them of their earned rights and expectations. Such retribution is inequitable and will not further the societal need to eradicate discrimination. While persons denied an opportunity to compete for employment in the past should be accorded the opportunity denied them, the effect of the Act would be unjust if it were held to permit them to take away what others, innocent of wrongdoing, have earned.

Finally, in enacting Title VII Congress was aware of the potential for conflict between the priorities granted thereunder and the rights granted under the National Labor Relations Act, 29 USC § 151, *et seq*. Accordingly, Congress expressed a clear desire that in weighing these competing interests under national policy, the rights accorded by the Labor Act should not be eroded by Title VII. Negotiated seniority rights are a product of collective bargaining fostered by the NLRA. The destruction of those rights as a means of remedying discriminatory hiring practices under Title VII is contrary to the balance struck by Congress.

ARGUMENT.

ARTIFICIAL SENIORITY IS ANTITHETICAL TO CONGRESSIONAL INTENT, EQUITY, AND THE PRIORITIES ESTABLISHED BY NATIONAL LABOR POLICY.

A. The Legislative History of Title VII, § 703(h), Establishes That Congress Intended to Preserve Seniority Rights From Erosion Under That Act.

The Fifth Circuit correctly determined that § 703(h) of Title VII bars the creation of artificial seniority rights. Throughout the Congressional debates opponents of Title VII criticized the Act because, they asserted, it would serve to destroy rights conferred on employees by virtue of collectively bargained seniority systems. In response to this criticism, proponents of the Act took great pains to insure that the purposes of Title VII were *not* as the opponents feared; that Title VII would *not* undermine seniority rights.

Thus, during the initial examination of H. R. 7152, the genesis of Title VII in the House, Chairman Cellar of the House Judiciary Committee, in response to criticism that the bill would destroy seniority rights, stated:

> "It has been asserted also that the bill would destroy worker seniority systems and employee rights vis-a-vis the union and the employer. This again is wrong. The bill would do no more than prevent a union, as it would prevent employers, from discriminating against or in favor of workers because of their race, religion, or national origin." 110 Cong. Rec. 1518 (1964).

Such assurances did not effectively assuage the fears of House opponents that the bill would sweep away seniority rights.[1] Opposition continued in the Senate.[2]

1. See, H. R. 914, 88th Cong., 1st Sess., 71-72 (1963).
2. See, 110 Cong. Rec. 486-487 (1964) (remarks of Senator Hill).

Early in the Senate debates, Senator Humphrey attempted to quiet the criticism levied against the bill by declaring that "this bill is not an instrument to abolish seniority or unions themselves as some have charged." 110 Cong. Rec. 6549 (1964). Echoing Senator Humphrey's statement, Senator Kuchel explained that under Title VII a court:

> "cannot order preferential hiring or promotional consideration for any particular race, religion or other group. Its power is solely limited to ordering an end to the discrimination which is in fact occurring. *Neither would seniority rights be affected by this Act.*" 110 Cong. Rec. 6563-64 (1964). (emphasis added).

In order to quell the continued opposition from opponents who challenged that Title VII would undermine seniority rights, Senator Clark along with Senator Case, his co-manager of the bill in the Senate, prepared a memorandum which explained that:

> "Title VII would have *no effect on established seniority rights. Its effect is prospective and not retrospective.* Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, *or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier.*" 110 Cong. Rec. 7217 (1964). (emphasis added).

Further, the Clark-Case memorandum responded to several questions raised by Senator Dirksen, one of the co-sponsors of the substitute amendments which were finally enacted into law. One of the questions and the response thereto was:

> Question: If an employer is directed to abolish his employment list because of discrimination, what happens to seniority?
>
> Answer: The bill is not retroactive, and it will not require an employer to change existing seniority lists." 110 Cong. Rec. 7216-17 (1964).

This question and answer particularly addresses the issue before the Court and resolves it. Thus, Senator Dirksen's question clearly asks whether seniority may be affected in order *to remedy* an employer's discriminatory hiring practice; that is, what happens to seniority in consequence of an employer's discrimination? Senator Clark's response to this pointed inquiry is equally unclouded: Insofar as seniority is concerned, the remedies under the bill are not retroactive; an employer found guilty of discrimination will not have to change existing seniority lists.[3]

Moreover, in direct rebuttal to Senator Hill's contention that Title VII would erase collectively bargained seniority rights, Senator Clark introduced a memorandum prepared by the Justice Department. That memorandum states in relevant part:

> "First, it has been asserted that Title VII would undermine vested rights of seniority. This is not correct. Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by Title VII. This would be true *even in the case* where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. Title VII is directed at discrimination based on race, color, religion, sex, or national origin. It is perfectly clear that when a worker is laid off or denied a

3. In general, the desire of the bill's proponents to persuade its critics that the bill would in no respect disturb existing seniority rights is also revealed in one of the preceding questions and answers:

> "Question: Would the same situation prevail in respect to promotions, when that management function is governed by a labor contract calling for promotions on the basis of seniority? What of dismissals? Normally labor contracts call for 'last hired, first fired.' If the last hired are Negroes, is the employer discriminating if his contract requires they be first fired and the remaining employees are white?
>
> "Answer: Seniority rights are in no way affected by this bill. If under a 'last hired, first fired' agreement a Negro happens to be the 'last hired,' he can still be the 'first fired' as long as it is done because of his status as 'last hired' and not because of his race."

chance for promotion because under established seniority rules he is 'low man on the totem pole' he is not being discriminated against because of his race. Of course, if the seniority rule itself is discriminatory, it would be unlawful under Title VII. If a rule were to state that all Negroes must be laid off before any white man, such a rule could not serve as the basis for a discharge subsequent to the effective date of the title. I do not know how anyone could quarrel with such a result. But, in the ordinary case, assuming that seniority rights were built up over a period of time during which Negroes were not hired, these rights would not be set aside by the taking effect of Title VII. Employers and labor organizations would simply be under a duty not to discriminate against Negroes because of their race. Any differences in treatment based on established seniority rights would not be based on race and would not be forbidden by the title." 110 Cong. Rec. 7207 (1964). (emphasis added).

After placing the Justice Department memorandum in the Record, Senator Clark concluded:

> "Mr. President, it is clear that the bill would not affect seniority *at all.*" 110 Cong. Rec. 7207 (1964). (emphasis added).

Finally, despite these efforts on the part of Title VII proponents to allay criticism regarding the effect of the Act on seniority rights and to end the filibuster which threatened passage of the bill, § 703(h) was expressly added as part of the Mansfield-Dirksen substitute.[4] Senator Humphrey explained the addition of § 703(h) "does not narrow the application of the Title, but merely clarifies its present intent and effect." 110 Cong. Rec. 12723 (1964).

4. § 703(h) provides in relevant part:

> "Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin."

It is clear that Congress intended that Title VII would not serve to undermine collectively bargained seniority rights of incumbent employees so long as the seniority system is itself nondiscriminatory.[5]

The Petitioners raise three challenges to this legislative history, none of which withstand scrutiny. First, Petitioners assert that because the foregoing statements concerning seniority rights occurred several weeks before insertion of Dirksen-Mansfield substitute containing § 703(h), those statements are not indicative of a Congressional intent to preserve those rights. This argument is contrary to this Court's view of the legislative history regarding Title VII. Thus, in *Griggs* v. *Duke Power Co., supra,* this Court, in construing the meaning and intent of § 703(h), considered "the sum of legislative history" including the Clark-Case memorandum, which Petitioners here claim to have no weight.[6]

5. Petitioners do not attack the "last hired, first fired" or employment date seniority system here at issue as containing discriminatory features which render it unlawful. Insofar as job applicants—as opposed to transfers—for the over-the-road driver jobs herein are concerned, the instant case does not involve departmental seniority, which locks black employees into lines of progression separate from their white counterparts and which has been condemned as not *bona fide*. Cf. *Griggs* v. *Duke Power Co., supra; Local 189, Papermakers* v. *United States,* 416 F. 2d 980 (5th Cir. 1969), *cert. denied,* 347 U. S. 919 (1970).

6. To the same effect, see *Alexander* v. *Gardner-Denver Co.,* 415 U. S. 36 (1974) and *Phillips* v. *Martin-Marietta Corp.,* 400 U. S. 542 (1971).

In evaluating the weight and significance to be given to the Senate commentaries on Title VII, particularly in the absence of the customary Senate committee reports usually indicative of Congressional intent, at least one legal scholar has observed: "Seldom has similar legislation been debated with greater consciousness of the need for 'legislative history', or with greater care in the making thereof, to guide the courts in interpreting and applying the law." Vaas, *Title VII: Legislative History,* 7 B. C. Ind. & Com. L. Rev. 431, 444 (1964). Accordingly, the views on seniority of Senate proponents of Title VII, such as Senators Humphrey, Kuchel, Clark and Case, should be given greater than normal weight in determining Congressional intent here.

Second, Petitioners contend that even if this legislative history indicates a clear intent on the part of Congress to preserve seniority rights, it expresses a desire to protect only those seniority rights which accrued prior to the effective date of the Act but not afterward. This contention is without merit. The Clark-Case memorandum expressly deals with the prospective effect of Title VII and states with respect to the future, that Title VII does not permit an employer ". . . once Negroes are hired, to give them special seniority rights at the expense of white workers hired earlier." 110 Cong. Rec. 7217 (1964), *supra*. The Justice Department memorandum, in stating that Title VII would have no effect on seniority rights accruing prior to the effective date of the Act cannot be taken as expressing limitation. The pure logic of language compels rejection of Petitioner's argument. Thus, according to that memorandum, since the bill was intended to prohibit disruption of existing seniority rights "*even* in the case" where those rights were built up as a result of *pre*-Act discrimination, it follows that neither did the bill sanction such disruption *after* it became effective. The use of the word "even" cannot otherwise be understood. The clear thrust of the legislative history is directed to the *prospective* effect of the Act. The proponents of Title VII who authored and directed the preparation of these memoranda did so to assure opponents of the bill that it would not operate to destroy seniority rights. If Congress had intended to place a protective "freeze" on only those seniority rights which had accumulated prior to the Act and permit nullification of accumulated, vested seniority rights thereafter, it surely would have said so in no uncertain terms. Since there was such considerable effort on the part of Senate proponents to allay the fears of the critics that seniority rights would be destroyed by the Act, it is illogical to suppose that a limitation such as that suggested by Petitioners would have been thought by the proponents to be sufficient for that purpose nor that the critics would so readily have accepted it.

Certainly, Congress, familiar with collectively bargained seniority systems employed in industry, must be taken to have known

that the accumulation of seniority is a continuous, on-going process. It is this process and the rights accruing thereunder which Congress did not want to disturb. The impact of depriving individual employees of their accumulated seniority rights is the same whether those rights accrued prior to the Act or after its effective date. Further, it is the same whether an employer discriminatorily refused to hire minority persons before the Act or, as in the instant case, afterward. Moreover, the impact is the same whether the victims of the discrimination are unknown or identified.[7] It is this impact which is contrary to Congressional intent.[8]

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7. See, *Watkins* v. *United Steelworkers*, ... F. 2d ....., No. 74-2604 (5th Cir., July 16, 1975), where the Fifth Circuit held that despite a history of pre-Act discrimination, a "last hired, first fired" seniority system did not discriminate against recently hired blacks who had not been the subject of the pre-Act hiring practices; and *Waters* v. *Wisconsin Steel Works*, 502 F. 2d 1309 (7th Cir. 1974), *pet. for writ. of cert. pending*, where the Seventh Circuit held that while a *post-Act* amendment to the seniority provisions favoring the recall of white employees over a black employee discriminated against the black *employee*, Waters, that practice did not discriminate against a black, Samuels, who was a mere *applicant* at the time of the amendment. The difference in granting seniority relief to Waters and not to Samuels lies in the fact that Waters, an employee, like his white counterparts, had vested seniority whereas Samuels, a mere applicant, had none. Relying on the legislative history set forth hereinabove, the Seventh Circuit in *Waters* reasoned that "a policy favoring recall of a former employee with experience even though white, before considering a new black applicant without experience comports with the requirements of Title VII and § 1981. *Id.* at 1320.

In deciding whether the seniority systems at issue in both *Watkins* and *Waters* were unlawful, the courts were of the view that nullification of these systems and accrued rights thereunder would be contrary to the policy expressed in § 703(h): "To hold otherwise would be tantamount to shackling white employees with a burden of a past discrimination created not by them but by their employer. Title VII was not designed to nurture such discriminatory preferences." *Waters, supra*, at 1320 citing *Griggs* v. *Duke Power Co., supra*, at 430-431; *Watkins, supra*, slip opinion at 6500. In the instant case, the impact of the preferential seniority, albeit as a remedy for past discriminatory refusals to hire, shackles white incumbent employees to the same degree.

8. The Respondent Union, after reviewing the legislative history of § 703(h) as well as § 703(j), 42 USC § 2000e-2(j), concludes that by that legislative history, Congress drew a distinction between

Finally, the Petitioners' contention that the policies which prohibit artificial seniority under the substantive provisions of the Act do not limit the authority of the courts to order such relief under the remedial section is unsound and has been rejected by this Court. In *H. K. Porter Co.* v. *NLRB*, 397 U. S. 99 (1970), this Court held that the Labor Board could not order an employer to agree to a union's proposal for a dues checkoff deduction as a remedy for its refusal to bargain over such a proposal since § 8(d) of the Labor Act[9] provides that the obligation to bargain does not require a party to agree to any proposal made by the other. The Court rejected the lower court's view that since § 8(d) deals only with substantive violations of the Labor Act, it does not limit the Board's remedial authority under § 10(c) of that Act:[10] "We do not

making discriminatees whole as a remedy for proven discrimination, as opposed to granting preferential treatment where there has been no violation of the Act. This conclusion is not supported by the legislative history of those sections. Nowhere in the legislative debates is the distinction drawn which the Union claims was intended. Indeed, the distinction is not expressed because the debates reveal it would have been inconsistent with the objections raised to the bill's impact on existing seniority rights and the assurances given in response. Rather, those debates establish that the prospective effect of the Act—both as regards violations and remedies—would not destroy seniority rights or countenance the establishment of preferential quotas. Indeed, contrary to the Union's erroneous conclusion, the "make whole" remedy of artificial retroactive seniority conflicts with Congress' desire to insure that seniority rights would in no way be affected by the operation of Title VII.

9. National Labor Relations Act, as amended, 29 USC § 158(d).

10. 29 USC § 160(c) provides in pertinent part:

> "If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and *to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.*" (Emphasis added.)

Compare the similarity between this language of the NLRA and that of § 706(g) of Title VII, which provides:

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, *and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay* (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), *or any other equitable relief as the court deems appropriate.*" (emphasis added).

agree . . . that the remedial powers of the Board are not also limited by the same considerations which lead Congress to enact § 8(d)." *Id.* at 107-108. Here, the Petitioners urge that since § 703(h), by its terms, deals only with the substantive provisions of the Act, it does not limit the remedial authority contained in § 706(g). This contention is exactly like the one rejected in *Porter*. There, the NLRB urged that since § 8(d) of the NLRA deals only with substantive violations, it has no impact on the remedial policy expressed in § 10(c). Here, as in *Porter*, this contention is anomalous and would render the policy reflected in § 703(h) nugatory. Petitioners urge further that since a result here such as that reached in *Porter* would preclude them from obtaining artificial retroactive seniority for the applicants they represent, such an interpretation should be rejected because of some overriding "public policy" consideration in raising the expectations of minorities. The Chamber submits that the remedial power of the Act, as limited by the policies which underlie § 703(h), does not grant job applicants the artificial seniority they desire; that policy determination was within the province of Congress and it is not, as the Fifth Circuit below held, for the courts to substitute their determination of policy for that of Congress. This is precisely the thrust of *Porter, supra.*[11]

11. The Petitioners' contention that the remedial policy of the Labor Act supports the creation of artificial seniority under Title VII is without foundation. Unlike the statutory similarity between the NLRA and Title VII regarding back pay, § 703(h) of Title VII prohibits interference with contractual seniority rights, whereas no such provision, express or otherwise, is contained in the Labor Act. Moreover, there is no legislative history on the NLRA comparable to that underlying § 703(h) of Title VII. The Chamber submits

B. The Remedy of Artificial Retroactive Seniority Inequitably Places A Burden of Retribution on Innocent Employees.

This Court has observed that in "any equity case, the nature of the violation determines the scope of the remedy."[12] Here, Respondent Bowman's violation of Title VII was to deny employment opportunity to a class of persons because of their race. The Fifth Circuit ordered Bowman to remedy this unlawful conduct by ordering it to give priority, nondiscriminatory consideration to previous black applicants who still desire to work for it and to pay them back wages lost as a result of the Employer's refusal to hire them. The burden of this remedy falls upon Bowman, the wrongdoer. However, since "seniority is a system of job security calling for reduction of work forces in periods of low production by layoff, first, of those employees with the most recent dates of hire", the primary burden of artificial retroactive seniority falls directly upon incumbent employees who had "no hand in the wrongdoing".[13]

Thus, while an award of artificial seniority to a class of applicants may well accord them the seniority benefits they would have enjoyed had they been hired when they first applied, those benefits can never be granted without concommitantly reducing the earned seniority rights of incumbent employees.[14] It is an

because of the absence of a provision similar to § 703(h) and the legislative history underlying it in the Labor Act, that Act is no measure of whether retroactive seniority can be granted to applicants under Title VII.

Petitioners' further contention that even if preferential seniority may not be ordered as a remedy under Title VII, it nonetheless may be ordered under 42 USC § 1981 was not raised before nor considered by the Court of Appeals and, therefore, is not properly before the Court. *Adickes* v. *S. H. Kress and Co.*, 398 U. S. 144, 147 n. 2 (1970) and cases cited therein.

12. *Swann* v. *Charlotte-Mecklenberg Bd. of Educ.*, 402 U. S. 1, 16 (1971).

13. *Meadows* v. *Ford Motor Co.*, 510 F. 2d 939, 949 (6th Cir. 1975).

14. It is because artificial seniority benefits can never be awarded without affecting a relative reduction of earned seniority rights of

insufficient answer to this most difficult problem to assert, as do Petitioners, that incumbent employees may be deprived of the seniority rights which they earned because minority applicants were excluded from an employer's labor force in the past. The Petitioners, in urging that the class members whom they represent be accorded artificial retroactive seniority to place them in their "rightful place" to remedy a past refusal to hire blacks, are untroubled by the fact that incumbent employees will be deprived of their right to remain in their earned, rightful place and realize their legitimate expectations. Thus, an employee who cast his lot to go and remain with a particular employer did so at the cost of foreclosing all other employment possibilities open to him at the time he made his choice and thereafter. That decision was made, and other options foregone, surely in large part as a consequence of the protections which accumulated seniority afforded him. By remaining with his employer, he has worked to obtain increased job security and upon that has based certain expectations. Indeed, these expectations have frequently been earned at the cost of enduring the hardships of strikes and lockouts. Seniority benefits did not flow to him as a consequence of the employer's past discrimination against others; they were earned. In anticipation of the job security, promotions and increasing benefits he had earned, the employee is likely to have made financial and other commitments which he might be unable to honor if his seniority and its attendant economic benefits were taken from him.

If hardship may be measured by loss of expectation of earned and anticipated benefits and the degree of forced alteration in life-style, it is surely arguable that the effect of the remedy sought by Petitioners here will produce a greater hardship on the innocent incumbents than did the original failure to hire

incumbent employees in contravention of the Congressional intent resulting in § 703(h), that the test for awarding backpay established for *Albemarle Paper Co.* v. *Moody, supra,* is inapplicable to this case. In *Albemarle,* the question concerned the circumstances which require the courts to exercise their discretion to grant a remedy *permitted* by the Act. Here, the question is whether the Act *prohibits* the courts from awarding the remedy sought by Petitioners.

on the innocent discriminatees. Where other forms of relief are available to the discriminatees than the grant of artificial retroactive seniority, it appears reasonable to look to such other relief in order to achieve the maximum equity with the least injury.

Discrimination against blacks is an historical fact which involves a miasma of sociological, economic and educational factors as well as legal ones. For the past twenty years this Court has taught that discrimination is legally wrong, that minority preferences are wrong, that all, regardless of race, must be given an equal right *to compete* in our society.[15] Petitioners now ask the Court to solve the multi-faceted problem of curing past discrimination against blacks by depriving others of the fruits of their legitimate efforts. Moreover, those who would be disadvantaged by the preferential relief sought by "rightful place" advocates, are those least responsible for and least able to bear the burden of the past.[16] The Chamber respectfully submits the inequitable misplacement of such a burden will not cure the effects of nearly two hundred years of discrimination nor further

15. *E.g., Brown* v. *Board of Education,* 347 U. S. 483 (1954); *DeFunis* v. *Odegaard,* 416 U. S. 312, 320 (1974) (Justice Douglas dissenting).

16.

> "The history of the racial civil rights movements has been to change the law to prevent the dominant status of one race over another race and to establish an equality of legal status. This has ironically created a new intangible power still controlled by Whites in power, who are haunted by 'white guilt' and seek to atone with a self-imposed restitution of the group. Fortunately for those in charge of determining the terms of the restitution, payment is to be made by other Whites not in power, or unable to enter the power structure because they have been told to stand aside." Flaherty and Sheard, *DeFunis, The Equal Protection Dilemma: Affirmative Action and Quotas,* 12 Duq. L. Rev. 745 (1974).

The authors point out that it is not the white persons who have control of the power structure who are likely to be disadvantaged by preference for blacks, but other racial and ethnic minorities and poor whites who together comprise what sociologists have described as the "underclass". See also Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—the Problem of Special Treatment,* 61 N. W. L. Rev. 363 (1966).

the purposes of Title VII. On the contrary, Title VII is successful because, as originally intended, it embodies the concept of meritocracy and reflects strong and just economic and social needs. The imposition of preferences, the burden of which must inequitably be borne by other employees, is as frustrating to these needs as is the original discrimination which it replaces.

C. Seniority Rights Are Established Under the National Labor Relations Act and May Not Be Eroded by Title VII.

The Justice Department memorandum inserted into the Senate debate by Senator Clark, in direct response to Senator Hill's objections to the Act, states that "[n]othing in Title VII or anywhere else in this bill affects rights and obligations under the NLRA . . .";[17] and Senator Clark expressely stated, after placing the memorandum in the Record, that Title VII "would not affect the present operation of the National Labor Relations Act *or rights existing under the labor laws.*"[18]

An employee's seniority rights are rights which exist under the labor laws. That is, the express policy of the NLRA is to promote and encourage collective bargaining between employers and representatives of employees for the purpose of negotiating terms and conditions of employment.[19] An employee's seniority rights are the product of collective bargaining. Indeed, as Petitioners acknowledge,[20] seniority rights may well be one of the most important terms and conditions of employment resulting from the historic struggle between business and labor. The legislative history underlying § 703(h) expressly demonstrates that Congress intended to preserve these important rights from erosion by the effects of Title VII. Given Congress' awareness of the tension between the National Labor Relations Act and

17. National Labor Relations Act, as amended, 29 USC § 151. *et seq.*

18. 110 Cong. Rec. 7207 (1964). (emphasis added).

19. NLRA, *supra,* at § 151.

20. Petition for Writ of Certiorari at 15, n. 15.

Title VII, the evidence of the Justice Department Memorandum and the very passage and language of § 703(h) itself reveals a Congressional determination that on the subject of seniority, the tension has been resolved in favor of the rights guaranteed in the National Labor Relations Act.

Thus, while remedying discrimination is a matter of priority under our national labor policy, granting artificial retroactive seniority negates the priority which Congress chose to accord collectively bargained seniority rights established under that same policy. Just this term, this Court has had occasion to weigh competing priorities established under Title VII and the NLRA and, even in the absence of a strong statutory prohibition similar to that expressed in § 703(h), subordinated a Title VII priority to certain greater interests served by the policies of the NLRA. The *Emporium Capwell Co.* v. *Western Addition Community Organization, supra.*

In that case, arising under the NLRA, minority employees sought to circumvent the collectively bargained grievance procedure and bargain directly with their employer over practices which they felt discriminated against them. Though the Court noted that "national labor policy embodies the principles of nondiscrimination as a matter of highest priority," it made that priority subservient to the policy favoring resolution of grievances through the collective bargaining machinery established under the NLRA.[21] In the instant case, as the legislative history underlying § 703(h) demonstrates, Congress chose to give priority to seniority rights established under the NLRA within the framework of Title VII. Thus, Congress has already weighed the competing interests here at issue and struck that balance in favor of preserving seniority rights. Accordingly, this Court should confirm the balance struck by Congress.

21. To the same effect see *Boys' Markets, Inc.* v. *Retail Clerks Local 770,* 398 U. S. 235 (1970), where this Court found that the policy of the Norris-LaGuardia Act prohibiting injunctions against strikes must give way to the national labor policy favoring peaceful resolution of labor disputes through arbitration procedures established through collective bargaining.

CONCLUSION.

For the foregoing reasons, the Chamber respectfully submits that the Court of Appeals' judgment denying an award of retroactive seniority should be affirmed.

Respectfully submitted,

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No. 74-728

In the Supreme Court of the United States

OCTOBER TERM, 1974

HAROLD FRANKS AND JOHNNIE LEE, PETITIONERS

v.

BOWMAN TRANSPORTATION COMPANY, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

QUESTION PRESENTED

Whether a district court, in fashioning a remedy under Title VII of the Civil Rights Act of 1964 for racially discriminatory refusals to hire, is precluded from granting seniority credit to qualified persons who were illegally denied employment because of their race.

INTEREST OF THE AMICI CURIAE

The United States and the Equal Employment Opportunity Commission are responsible for enforcing Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. 2000e, *et seq.*, which

prohibits discriminatory employment practices. Consistent with that responsibility, we filed a memorandum in this Court in support of the petition for a writ of certiorari in this case. We have recently expressed the government's views on the question of awarding back pay under Title VII to members of an identifiable class of persons who have suffered economic injury because of racially discriminatory employment practices. See Brief for the United States and the EEOC as *Amici Curiae* in *Albemarle Paper Company* v. *Moody*, No. 74–389, and *Halifax Local No. 425, United Papermakers and Paperworkers* v. *Moody*, No. 74–428, this Term. Relief in the form of retroactive seniority for identified victims of employment discrimination has been included in consent decrees negotiated by the Department of Justice under Title VII.[1]

In its interpretation of Title VII, the decision of the court of appeals in the present case would restrict the scope of relief that may be fashioned by district courts to remedy unlawful refusals to hire on the basis of race. The case thus directly affects the government's enforcement responsibilities.

[1] See, *e.g.*, *United States* v. *Roadway Express, Inc.*, C.A. No. C–68–321 (N.D. Ohio) (consent decree entered September 1, 1970, partially reported at 2 EPD ¶ 10,295, p. 1176), affirmed, 457 F. 2d 854 (C.A. 6); *United States* v. *Navajo Freight Lines, Inc.*, C.A. No. 72–116–MML (C.D. Cal.) (supplemental order to consent decree entered January 15, 1973); *United States* v. *Pilot Freight Carriers, Inc.*, C.A. No. C–143–WS–71 (M.D. N.C.) (consent decree entered October 31, 1972). See also *United States* v. *Georgia Power Co.*, 7 EPD ¶ 9167 (N.D. Ga.) (parties agreed to order on remand from 474 F. 2d 906 (C.A. 5)).

STATEMENT

This class action was brought by petitioners in the United States District Court for the Northern District of Georgia.[2] The complaints alleged that respondents (an interstate trucking company, a local union representing employees at the company's Atlanta terminal, and the international union) engaged in racially discriminatory employment practices in violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. 1981. They sought an injunction against the continuation of those practices and other relief, including individual compensatory back pay and seniority credit (App. 11a–12a, 17a).

1. After a trial, the district court found, with respect to the matters pertinent here, that the company followed an unlawful practice of excluding blacks from employment as over-the-road drivers on account of their race. Prior to 1970, the company "adopted an unwritten policy against hiring Blacks for [over-the-road driver] jobs" (Pet. App. A50). Thereafter, "the hiring of Black road drivers was 'put off as long as could' by the company" (*ibid.*). Although several black applicants were hired for such jobs starting in 1970 (*ibid.*), other apparently qualified and experienced black applicants, who "were entitled to consideration for employment at the time," "were told there were no openings when in fact there were" (*ibid.*). The court accordingly found that black applicants

[2] Petitioner Franks filed his complaint on May 5, 1971; petitioner Lee moved to intervene as a plaintiff and filed his complaint on July 21, 1971 (App. 1a).

were "effectively denied employment as over-the-road drivers prior to January 1, 1972" (*id.* at A67).

The court enjoined further discrimination in violation of Title VII of the Act, ordered the company to notify each black applicant who had been rejected prior to January 1972 that he will be considered for employment if he indicates interest within 30 days of the notice, and directed that such persons who do indicate interest "shall be afforded priority in consideration over all other applicants until each such applicant, in chronological order, has been accepted or rejected by the company" (*id.* at A67).

The court declined, however, to require that non-named but identifiable members of the affected class be given back-pay awards or retroactive seniority credit when hired (*id.* at A53–A54).[2] "[S]uch relief,"

[2] The collective bargaining agreements in effect between the company and the union during the relevant period attach importance to an employee's seniority for several purposes. Under the August 1970 agreement (reproduced in part at App. 48a–51a), seniority controls (1) selection from among applicants who have bid on job vacancies (Art. IV, ¶ 7; App. 49a–50a); (2) the length of paid vacations (Art. VI, ¶ 1; App. 51a) and, to some extent, the scheduling of such vacations (Art. VI, ¶ 4; R. 574); (3) the order of lay-off and recall (Art. IV, ¶ 5; App. 49a); and (4) the accumulation of payments into the pension fund by the employer on the employee's behalf (Art. X; R. 577).

The relief characterized by the term "retroactive seniority" would afford to persons hired under the district court's order the seniority they would have had if the company had not originally denied them a road driver's job on the basis of race. The seniority date would be fixed at a point earlier than the date on which they are actually hired: for example, the date when they would have been hired but for the unlawful discrimination.

it held, "is not warranted in class actions," because it "presuppose[s] a vacancy, qualification, and performance by every member" and because it would "bypass the statutory administrative prerequisites to personal suit established by the Congress and any appropriate statute of limitations" (*id.* at A54). "For these reasons, as well as in the exercise of discretion," the court rejected those forms of relief (*ibid.*).

2. The court of appeals reversed the district court's denial of back pay to non-named class members (*id.* at A37–A40) but affirmed its denial of retroactive seniority credit (*id.* at A29–A31). The court of appeals held that relief in the nature of seniority credit, requiring the creation of "constructive seniority for applicants who have never worked for the company" (*id.* at A30), is prohibited by Section 703(h) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–2(h), which provides that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system * * *."

"The discrimination which has taken place in a refusal to hire," the court of appeals stated, "does not affect the bona fides of the seniority system. Thus, the differences in the benefits and conditions of employment which a seniority system accords to older and newer employees is protected as 'not an unlawful employment practice'" (Pet. App. A30).

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SUMMARY OF ARGUMENT

I

A. When a district court finds that an employer has intentionally engaged in unlawful employment practices under Title VII, it may "order such affirmative action as may be appropriate, which may include * * * any * * * equitable relief as the court deems appropriate" (42 U.S.C. (Supp. III) 2000e–5(*g*)). That broad remedial authority reflects a clearly expressed legislative purpose to eradicate the effects of past unlawful employment discrimination by restoring the identifiable victims of the discrimination as far as possible to the position they would have been in but for the discrimination. The courts are authorized to fashion the most complete relief possible in order to effectuate that purpose.

The most complete relief possible to remedy racially discriminatory refusals to hire includes not only requiring the employer to give the victims of the discrimination priority in filling new vacancies, together with back pay to compensate them for the financial injury they have suffered in the interim, but also awarding them seniority credit from the date they would have been hired were it not for the unlawful discrimination. In the absence of such seniority credit, the victims would not be made whole, since their lower seniority status would permanently subordinate them—for purposes of job security and important fringe benefits—to employees who were hired in their place. The district court has authority to award seniority credit in order to ensure that the victims will

not continue to suffer injury in the future as a consequence of the employer's initial refusal to hire them on account of their race.

B. Section 703(h) of the Act—which provides that differences in the terms and conditions of employment, if applied pursuant to a *bona fide* seniority system, are not unlawful unless they are the result of an intention to discriminate on the basis of race—is not a bar to seniority relief. Where such differences are applied through a seniority system that disfavors the identified victims of past (post-Act) discrimination, they *are* the result of an intention to discriminate on the basis of race.

Moreover, Section 703(h) addresses only what constitutes an unlawful employment practice; it does not purport to limit the court's remedial power to prescribe effective relief once a violation is established. The relief sought here would not alter the company's existing seniority system. It would merely restore the qualified members of the affected class of discriminatees to their rightful place within that system.

The legislative history of the Act reflects an intention to avoid requiring employers to remedy pre-Act racial discrimination in hiring by giving special seniority rights to different members of the disfavored racial group who may be hired after the Act is in effect. But the members of petitioners' class in this case were unlawfully denied employment *after* the Act took effect, and the relief sought would apply only to identifiable persons who were actually discriminated against by the employer. It would not involve preferential treatment on the basis of race.

C. Seniority relief may properly be awarded to members of petitioners' class regardless of whether each member filed an administrative charge with the Equal Employment Opportunity Commission. There is no reason to require the filing of numerous identical charges when a single charge by the class representative satisfies the purpose of Title VII's notice and conciliation requirements. Congress considered and rejected such a requirement when it enacted the 1972 amendments to the Act.

Nor does Rule 23(b)(2) of the Federal Rules of Civil Procedure preclude seniority relief to the class. That relief would be injunctive in nature. In any event, even to the extent that compensatory seniority relief resembles back pay, the relief sought in this class action does not relate "exclusively or predominantly to money damages" (Advisory Committee Notes to Rule 23(b)(2)).

II

The denial of seniority relief in this case was not a proper exercise of the district court's remedial discretion. That discretion must be exercised in a manner that effectuates the Act's remedial policy of making the victims of unlawful discrimination whole as far as possible. Ordinarily, therefore, a district court should award seniority credit to the identifiable victims of unlawful employment discrimination unless, for some articulated reason consistent with the Act's policy, the court finds that such an award would be unnecessary, inappropriate, or impracticable.

The reasons given by the district court in this case do not justify denying the requested relief. Contrary to the district court's view, there is no need for each member of the affected class to file individual charges with EEOC. Nor should it be an obstacle to effective relief that the record does not yet contain detailed evidence with respect to the circumstances in which each member of the class was refused employment. That evidence can be presented only after the members of the class have been identified. That some members may be entitled to no seniority credit does not mean that the entire class should be given less than adequate relief.

ARGUMENT

I

UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, DISTRICT COURTS HAVE POWER TO AWARD RETROACTIVE SENIORITY CREDIT TO THE IDENTIFIABLE VICTIMS OF UNLAWFUL HIRING DISCRIMINATION IN ORDER TO RESTORE THEM TO THE SITUATION THEY WOULD HAVE BEEN IN BUT FOR THE DISCRIMINATION

A. The remedial policy of the Act—to remedy the effects of past employment discrimination by making the victims whole as far as possible—comprehends awards of retroactive seniority to qualified persons who were wrongfully denied employment on account of their race

The district court found that the company engaged in unlawful discriminatory employment practices by refusing to hire apparently qualified black applicants for over-the-road driver positions on account of their

race. The court was therefore authorized under Section 706(g) of the Act, as amended, 42 U.S.C. (Supp. III) 2000e–5(g), to enjoin the unlawful practices and to "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay * * *, or any other equitable relief as the court deems appropriate."

The broad remedial authority thus invested in the district court reflects a congressional policy, not only to eliminate discriminatory employment practices, but also to eradicate the effects of past unlawful discrimination by restoring the identifiable victims of the discrimination as far as possible to the situation they would have been in but for the discrimination. "The clear purpose of Title VII is to bring an end to the proscribed discriminatory practices and to make whole, in a pecuniary fashion, those who have suffered by it" (*Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711, 720 (C.A. 7)).[4]

This "make whole" purpose of Title VII is confirmed by the legislative history of the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 107, which amended Section 706(g) to make explicit that

[4] See also *Rosen* v. *Public Service Electric and Gas Co.*, 477 F. 2d 90, 96 (C.A. 3); *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 804 (C.A. 4); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F. 2d 211, 252 (C.A. 5); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F. 2d 1364, 1375 (C.A. 5); *United States* v. *Georgia Power Co.*, 474 F. 2d 906, 921 (C.A. 5); *Head* v. *Timken Roller Bearing Co.*, 486 F. 2d 870, 876 (C.A. 6); *Sprogis* v. *United Air Lines, Inc.*, 444 F. 2d 1194, 1202 (C.A. 7), certiorari denied, 404 U.S. 991.

the district court's remedial authority is not limited to reinstatement or hiring with back pay but also includes "any other equitable relief as the court deems appropriate." The Section-by-Section Analysis of the 1972 Act, presented to the House and the Senate at the time the Conference Report on the Act was submitted to each body (118 Cong. Rec. 7166–7169, 7563–7567 (1972)), states with respect to Section 706(g) (*id.* at 7168, 7565; emphasis added):

> The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also *requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.*

The power of the district court under Title VII "to fashion the most complete relief possible * * * to make the victims of unlawful discrimination whole" (*ibid.*) is not unique. It is "the historic power of equity to provide complete relief in light of the statutory purposes" (*Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292). A court of equity may "give whatever * * * relief may be necessary

under the circumstances" in order to "do complete rather than truncated justice" (*Porter* v. *Warner Holding Co.,* 328 U.S. 395, 398). Particularly in the enforcement of the civil rights statutes, "the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future" (*Louisiana* v. *United States,* 380 U.S. 145, 154).

In fashioning an effective remedy upon a finding of unlawful hiring discrimination under Title VII, the district court has the power, not only to enjoin future violations (which would eliminate the discriminatory practices prospectively) and to award back pay (which would compensate the victims for the financial injury they have already suffered), but also to award retroactive seniority credit to ensure that the identifiable victims of the wrongful refusals to hire are truly "restored to a position where they would have been were it not for the unlawful discrimination" (Section-by-Section Analysis, *supra,* 118 Cong. Rec. 7168, 7565). An employee's seniority, in the context of the existing collective bargaining agreement, determines his competitive position in bidding on job vacancies, his susceptibility to layoff and recall, and the nature and extent of important fringe benefits (see note 3, *supra*). As this Court has stated, "[s]eniority has become of overriding importance, and one of its major functions is to determine who gets or who keeps an available job" (*Humphrey* v. *Moore,* 375 U.S. 335, 346–347).

If the company had not engaged in unlawful hiring discrimination prior to 1972, qualified black applicants for over-the-road driver jobs would have been employed in those jobs years ago and would today have accumulated substantial seniority. Merely hiring the identified victims of that discrimination without affording them the seniority credit they could reasonably be expected to have accumulated is less than "the most complete relief possible" (Section-by-Section Analysis, *supra,* 118 Cong. Rec. 7168, 7565).

In the absence of appropriate seniority credit, a newly hired black driver whose application was unlawfully rejected by the company in 1970 because of his race would be permanently disfavored with respect to the terms and conditions of his employment, because his seniority status would be forever subordinated to the seniority status of the driver hired in his place and of those thereafter hired prior to his own belated hiring. The result would be a perpetuation of the effects of the company's discriminatory refusal to hire him in 1970. An award of back pay would compensate him for the financial injury he may have suffered between 1970 and the date of his employment with the company, but it would not eliminate the financial and other injury he will suffer in the future as a result of the company's initial racially discriminatory refusal to hire him. Cf. *Quarles* v. *Philip Morris, Inc.,* 279 F. Supp. 505, 513–514 (E.D. Va.).

The National Labor Relations Board has interpreted Section 10(c) of the National Labor Relations

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Act, 29 U.S.C. 160(c)[5]—the model for Section 706(g) of the Civil Rights Act of 1964[6]—to authorize an award of retroactive seniority as a remedy for unlawful refusals to hire because of union activity. It is appropriate in such circumstances, the Board has ruled, to require the employer "to credit all these employees with such seniority and other rights and privileges that would have accrued to them as of the dates when they would have been hired, absent the discrimination against them." *Atlantic Maintenance Co.*, 134 NLRB 1328, 1336, enforced, 305 F. 2d 604 (C.A. 3); see also *Southern Electrical & Pipefitting Corp.*, 131 NLRB 44; *Lamar Creamery Co.*, 115 NLRB 1113, enforced, 246 F. 2d 8 (C.A. 5).

The district court's power under Section 706(g) of Title VII to grant "the most complete relief possible" (Section-by-Section Analysis, *supra*) similarly comprehends the authority to award retroactive seniority credit in appropriate cases.

B. Section 703(h) of the Act is not a bar to an award of seniority credit

The court of appeals correctly recognized that "the purpose of Title VII * * * is to make the discrimina-

[5] Section 10(c) authorizes the Board, upon a finding that a person engaged in an unfair labor practice, to issue a cease and desist order and to require the person "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter * * *."

[6] See *United States* v. *Georgia Power Co.*, 474 F. 2d 906, 921, n. 19 (C.A. 5); 110 Cong. Rec. 6549 (1964) (remarks of Senator Humphrey).

tee whole and to remedy the effects of past discrimination" (Pet. App. A23). It nevertheless affirmed the district court's denial of seniority credit relief, because it concluded that such relief is barred by Section 703(h) of the Act, 42 U.S.C. 2000e–2(h). That section provides that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, * * * provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin * * *."

None of the parties in this Court defends the court of appeals' holding on this point,[7] and we believe it is plainly incorrect. See *Jurinko* v. *Edwin L. Wiegand Co.*, 477 F. 2d 1038 (C.A. 3), vacated and remanded on other grounds, 414 U.S. 970; *Meadows* v. *Ford Motor Co.*, 510 F. 2d 939 (C.A. 6), pending on petition for a writ of certiorari *sub nom. Local 862, International Union, United Automobile Workers* v. *Ford Motor Co.*, No. 74–1349.

First, the company's seniority system, as it affects the class of black over-the-road drivers who were previously denied employment because of their race, is not protected by Section 703(h). The proviso to that

[7] The company, in its brief in opposition to the petition for a writ of certiorari, "conceded that the view of the Fifth Circuit may be incorrect concerning the effect of section 703(h) upon the seniority remedy sought by petitioners" (p. 3). The union, in its response to the petition, similarly expressed "real doubts as to the correctness of the decision below" (p. 4).

section limits its protection to seniority systems in which the differences in terms and conditions of employment "are not the result of an intention to discriminate because of race * * *." Where those differences are applied to the disadvantage of newly hired persons who are the identified victims of a prior unlawful refusal to hire, the differences *are* "the result of an intention to discriminate because of race." Were it not for the prior unlawful discrimination, the newly hired discriminatees would have accumulated substantial seniority credit and would have enjoyed the full benefits of that seniority. The differences between the seniority benefits to which they would have been entitled in the absence of the company's unlawful conduct and the seniority benefits to which they will be entitled when they are finally hired are differences that result directly from discrimination on the basis of race.

Second, and more fundamentally, Section 703(h) addresses only what constitutes an unlawful employment practice. It does not purport to limit the district court's broad remedial power to prescribe effective relief once a violation is established. Subsections (a) through (d) of Section 703 specify the employment practices that are made unlawful by Title VII; subsections (e) through (j) exempt certain practices from the range of possible violations. Thus, subsection (h) provides that applying different conditions of employment pursuant to a *bona fide* seniority system "shall not be an unlawful employment practice."

Neither on its face nor when read in the context

of the other sections of Title VII does Section 703 circumscribe the district court's authority under Section 706(g) to fashion the most effective relief possible upon a finding that unlawful employment practices have been committed. That a particular employment practice is not by itself unlawful under Title VII does not mean that it is beyond the remedial reach of the district court. Modification or even elimination of an otherwise lawful practice may be necessary in certain circumstances to provide effective relief from a practice that is unlawful. Thus, even if, as the court of appeals held, the company's seniority system in this case falls within the Section 703(h) exemption and therefore is not itself an unlawful employment practice, that does not insulate the system from remedial adjustments that are reasonably necessary to eradicate the effects of prior unlawful refusals to hire.[8]

Moreover, the seniority credit relief sought on behalf of the class here requires neither a modification nor an elimination of the existing seniority system. It would merely give the qualified members of the class their rightful place within that system by calculating their seniority from the date they would have been hired were it not for the company's unlawful racial discrimination.

[8] Petitioners also argue that Section 703(h) would not in any event affect the district court's authority to grant retroactive seniority pursuant to their cause of action under 42 U.S.C. 1981. Since in our view Section 703(h) does not prevent the granting of the relief requested under Title VII, we believe the Court need not reach any issue under Section 1981.

The legislative history of Title VII reflects no congressional purpose to prohibit an award of retroactive seniority credit to identifiable victims of post-Act hiring discrimination. It does reflect an intention to protect seniority lists in effect at the time the Act took effect and to free employers who engaged in pre-Act racial discrimination from any obligation to give special seniority rights to blacks hired after the Act.[9]

Here, however, the affected class of black applicants were discriminatorily denied employment *after* the Act became effective, and the relief sought would not disrupt any seniority list in effect on the Act's effective date. It would make adjustments in the post-Act seniority list because that list is a product of employment practices made unlawful under the Act. The requested relief would inure only to the benefit of the specific, identifiable individuals who were previously denied employment by the company because of their race.

It follows that the court of appeals' reliance here on the dicta in its prior decision in *Local 189, United Papermakers and Paperworkers* v. *United States*, 416 F. 2d 980, was inappropriate. The court in *Local 189* held unlawful a department seniority system that perpetuated the effects of past racial discrimination by

[9] See the Department of Justice and Clark-Case interpretative memoranda placed in the record by Senator Clark (110 Cong. Rec. 7206–7207, 7212–7215 (1964)), the pertinent portions of which are reproduced in the Brief for Petitioners (pp. 25–26, nn. 34 and 35).

limiting the access of black employees to formerly white jobs. In rejecting an argument that the department seniority system was protected by Section 703 (h), the court distinguished the situation before it from a situation in which black employees hired after the Act's effective date would be given preferential seniority treatment because of the employer's pre-Act discrimination. The court stated with respect to the latter situation (416 F. 2d at 995):

> [R]equiring employers to correct their pre-Act discrimination by creating fictional seniority for new Negro employees would not necessarily aid the actual victims of the previous discrimination. There would be no guaranty that the new employees had actually suffered exclusion at the hands of the employer in the past, or, if they had, there would be no way of knowing whether, after being hired, they would have continued to work for the same employer. In other words, creating fictional employment time for newly-hired Negroes would comprise preferential rather than remedial treatment. The clear thrust of the Senate debate is directed against such preferential treatment on the basis of race. * * *

The court's comments are not at all applicable to the present case, where seniority credit is sought on behalf of actual, identifiable victims of post-Act hiring discrimination. Such relief in the context of the facts here would plainly be remedial and not "preferential" (as that term was used in *Local 189*).

C. Retroactive seniority may properly be awarded to class members who previously were denied employment on account of their race, whether or not they filed individual charges with the Equal Employment Opportunity Commission.

The company's Brief in Opposition to the petition for a writ of certiorari argues that, while Section 703(h) does not bar seniority credit relief for individual plaintiffs, "the seniority remedy * * * is not appropriate in a Rule 23(b)(2) class action" and, in any event, "is not available to class members with respect to whom a charge has not been filed under Title VII with the EEOC" (Br. in Opp. 6). Neither contention is substantial. Both were correctly rejected by the court of appeals (Pet. App. A37–A40), albeit in connection with the back pay issue.

Rule 23(b)(2) of the Federal Rules of Civil Procedure applies where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole * * *." The function of the rule is not to restrict the relief available in a class action but to establish the circumstances in which it is proper to maintain a class action. The proper inquiry, therefore, is not whether seniority credit relief can be granted under the rule to members of a class, but whether it is permissible to maintain a Rule 23(b)(2) class action when seniority credit relief is requested.

The answer to that question is clear. The seniority credit relief sought in this case is injunctive in nature

and would be applicable to the class as a whole. Thus, even if that were the *only* relief sought, a class action would be appropriate. Here, however, petitioners also sought an injunction against the continuation of allegedly unlawful employment practices that plainly affected the entire class as a group.

Therefore, even if the individual compensatory nature of seniority credit relief somehow alters its injunctive nature, so that it is similar to an award of back pay, that would not affect the propriety of the class action here. The Advisory Committee Notes to subsection (b)(2) of Rule 23 state that it "does not extend to cases in which the appropriate final relief relates *exclusively or predominantly* to money damages" (emphasis added). What the court of appeals said in this context with respect to the back pay issue is equally applicable to the seniority issue (Pet. App. A39):

> [T]his Title VII action cannot be characterized as one seeking "exclusively or predominantly money damages." * * * [B]ack pay awards under Title VII * * * are not damages, as such, but an integral part of the equitable remedy. Even if back pay is considered as equivalent to damages under Rule 23, in this case back pay is not the exclusive or predominant remedy sought.

The company's other contention—that seniority credit relief should not be granted to class members who did not file individual charges with EEOC—was also correctly answered by the court of appeals in the context of the back-pay issue (Pet. App. A38–A39).

We addressed a similar contention with respect to back-pay relief in our *amicus* brief in *Albemarle Paper Co.* v. *Moody,* Nos. 74–389 and 74–428 (pp. 31–33).[10]

We rely here on the court of appeals' opinion and the discussion in our brief in *Albemarle.* As the court of appeals stated, "[a]n EEOC complaint filed by the class representative allows an adequate opportunity for resolution of problems of the class through conciliation, * * * and opens the courthouse doors for the class" (Pet. App. A38). Congress explicitly rejected in the 1972 Act the limitation on class action relief that the company now seeks from this Court. The Section-by-Section Analysis, *supra,* stated: "[T]he leading cases in this area to date have recognized that many Title VII claims are necessarily class action complaints and that, accordingly, it is not necessary that each individual entitled to relief be named in the original charge or in the claim for relief. A provision limiting class actions was contained in the House Bill and specifically rejected by the Conference Committee" (118 Cong. Rec. 7168, 7565 (1972)).

II

THE DENIAL OF SENIORITY CREDIT IN THIS CASE CANNOT BE SUSTAINED AS A PROPER EXERCISE OF THE DISTRICT COURT'S REMEDIAL DISCRETION

As we view this case, the sole question presented is whether the district court is prohibited from awarding

[10] We have furnished copies of our brief in that case to counsel for the parties in this case.

retroactive seniority credit as a remedy for discriminatory hiring practices in violation of Title VII. In its Brief in Opposition to the petition for a writ of certiorari, however, the company—while conceding (p. 4) that an award of retroactive seniority is properly within the scope of the district court's remedial discretion under Section 706(g)[11]—argued that "[t]he district judge exercised his discretion in the present case, and the Court of Appeals found no abuse of discretion" (*ibid.*).

Both statements are literally accurate, but neither can support the judgment below. While the district court purported to rest its denial of seniority credit relief upon an "exercise of discretion" (Pet. App. A54), it gave no sufficient reason to justify its refusal to grant the requested relief. And, having held that the district court was barred from awarding seniority credit—*i.e.,* that it had no discretion in the matter, the court of appeals had no reason to consider whether the district court abused the discretion it did not have.

We have already shown that the district court *does* have discretion to grant such relief. Was its refusal to do so here a proper exercise of that discretion? We think not.

To say that a matter is within a court's discretion means, in the words of Chief Justice Marshall, that it

[11] That concession, however, is qualified by the company's contention, discussed above, that such relief may not properly be granted to other than the named plaintiffs in this case.

is addressed not to the court's "inclination, but to its judgment; and its judgment is to be guided by sound legal principles" (*United States* v. *Burr,* 25 Fed. Cas. 30, 35). In the enforcement of a statutory scheme, the courts must exercise their discretion "in light of the large objectives of the Act"; their discretionary remedial determinations must "reflect an acute awareness" of the congressional policy (*Hecht Co.* v. *Bowles,* 321 U.S. 321, 331).

In the context of Title VII, that policy, as we have indicated, is to grant the most complete relief possible in order to end the unlawful discrimination and make the victims of that discrimination whole. It follows that the district court "has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future" (*Louisiana* v. *United States, supra,* 380 U.S. at 154). As the court of appeals in this case correctly stated, "[i]f an appellate court can determine from the record that the relief granted is not sufficient to make the discriminatee whole as far as possible, then the district court's order falls outside the bounds of its discretion" (Pet. App. A23–A24).

As we have stated (pp. 12–13, *supra*), hiring priority and back pay awards for those who were previously denied employment on account of their race are not the most complete relief possible. It leaves those persons permanently subordinated in terms of seniority to the white employees who were hired in their place and fails to restore them to the position they would have been in but for the company's unlawful discrimination.

In our view, therefore, the proper standard here is similar to the standard we proposed in *Albemarle* for the awarding of back pay relief: the district courts should ordinarily award seniority credit to the identifiable victims of unlawful employment discrimination, unless there are substantial countervailing considerations that make such an award unnecessary, inappropriate, or impracticable. The district court should articulate its reasons for denying such relief, and those reasons should be carefully scrutinized by the appellate courts to ensure that they are consonant with the purposes of the Act and that the district court has fashioned the fullest possible relief consistent with fairness. Cf. *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U.S. 400.

We recognize that the burdens of seniority relief fall in part upon innocent workers whose existing job security and expectations may be diluted as a consequence of such relief to the victims of the company's discriminatory practices.[12] To a certain extent, how-

[12] That would be true, of course, only with respect to those seniority benefits that are competitive in nature, such as job-bidding and order of layoff. It would not be true with respect to such fringe benefits as vacation time and pension fund payments, which are also determined on the basis of seniority. As the union stated in its response to the petition for a writ of certiorari, "[t]here is no statutory policy which even arguably precludes retroactive investment of length of service for fringe benefit computation purposes" (p. 6). See *Meadows* v. *Ford Motor Co., supra,* 510 F. 2d at 949. Indeed, in many contexts an award of back pay would be an incomplete remedy even for past financial loss if it were not supplemented with an award of seniority credit for fringe benefit purposes.

ever, those expectations are themselves the fruit of the company's unlawful discrimination. Were it not for the company's practice of denying employment on the basis of race, some existing employees might never have been hired and others might not have advanced to their current relative seniority position. Thus, as the Second Circuit stated in *United States* v. *Bethlehem Steel Corp.*, 446 F. 2d 652, 663:

> Assuming *arguendo* that the expectations of some employees will not be met, their hopes arise from an illegal system. Moreover, their seniority advantages are not indefeasibly vested rights but mere expectations derived from a bargaining agreement subject to modification. * * * If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed.

There may be circumstances, of course, in which an award of full seniority credit should be deferred until completion of a training or apprenticeship program. Practical considerations of this kind should properly be taken into account by the district court in fashioning a decree.[13]

Finally, where seniority credit is for some reason an inappropriate or unworkable remedy (as, for example, where the victim of discrimination is unlikely to be hired at all because no vacancy is likely to occur), the district court should consider alternative

[13] Though the record in the present case may not be complete in this respect, we are unaware of any practical obstacle to the awarding of full seniority credit to petitioners' class.

forms of relief. One such alternative, suggested by the union's response to the petition for a writ of certiorari in this case, is "front pay"—that is, a money award designed to compensate the newly hired discriminatee for the injury that he will suffer in the future as a consequence of his later seniority date. We do not view front pay as an adequate substitute for seniority credit, because some important benefits attached to higher seniority cannot adequately be compensated for in money. In an appropriate case, however, front pay may constitute the most complete relief possible.

The district court in the present case stated two reasons for denying seniority credit to members of petitioners' class. One was that the class members had not filed individual administrative charges with EEOC. As we stated above, that is not a proper reason for denying relief to the class.

The other reason was that "[t]he claims for retroactive seniority * * * presuppose a vacancy, qualification, and performance by every member" of the class, and "[t]here is no evidence on which to base these multiple conclusions" (Pet. App. A54). But that is not a reason to deny effective relief. The qualifications of each person who was denied employment because of his race, and the question whether he would have been hired to fill a vacancy in the absence of discrimination, are issues to be resolved by the court after it has determined that relief is appropriate and after all members of the class who now wish to be considered for employment have been identified. Indeed, essentially the same questions are to be resolved by the district court in this case under the court of appeals'

remand order (see Pet. App. A39–A40). If the evidence shows that a particular applicant is unqualified or that for other reasons he would not have been hired even in the absence of the company's unlawful discrimination, then he would not be entitled to the relief. Although it is probably impossible to determine now what a qualified applicant's job performance would have been had he been hired initially, that impossibility is a result of the company's wrongdoing and should not be a reason for denying the applicant complete relief.

It may be that on remand the evidence will show some other reason, consistent with the Act's purposes and with the principles we have suggested, for denying seniority credit relief. No such reason appears on the present record.

CONCLUSION

Insofar as it affirmed the denial of retroactive seniority relief to the members of petitioners' class, the judgment of the court of appeals should be vacated and the case should be remanded to that court with directions that it be remanded to the district court for further consideration of retroactive seniority relief in accordance with the proper remedial standard.

Respectfully submitted.

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Respondents.

PETITIONERS' SUPPLEMENTAL MEMORANDUM

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PETITIONERS' SUPPLEMENTAL MEMORANDUM

Petitioners submit this Supplemental Memorandum in response to the suggestion by Mr. Justice Blackmun at oral argument of this cause on November 3, 1975.

In *Tilton* v. *Missouri Pacific Railroad Co.*, 376 U.S. 169 (1964), this Court held that Sections 9(c)(1) and 9(c)(2) of the Universal Military Training and Service Act (1948), 50 U.S.C. §§ 459(c)(1), (2) entitled a re-employed returning veteran "to enjoy the seniority status which he would have acquired by virtue of continued employment but for his absence in military service." 376 U.S. at 181. The principle underlying that decision and others similar to it,[1] and which forms the basis of the pertinent statutory provisions, is that individuals in the statutorily protected group (veterans) should not be penalized in their seniority standing by their inability to have worked during their period of military service to the nation, 376 U.S. at 171.[2] Implicit in that principle, and explicit in other similar

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[1] See, e.g., *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1946) and authorities cited in Petitioners' main brief at pp. 37-38 and n.55.

[2] The Court noted that such legislation should be liberally construed to protect the intended beneficiaries, 376 U.S. at 181.

decisions,[3] is the concept that seniority dates based on actual employment periods are subject to modification in accordance with statutes giving rights to categories of employees whom Congress has chosen to protect for reasons of public policy.

Tilton presented a more complex situation than earlier returning-veteran cases, or than the instant case, because it involved a promotional problem in which an employee's progression depended on both seniority and completion of a helper (training) period, 376 U.S. at 172-3. Petitioners' case here presents no such complications: only the job of truck driver is involved, and once an employee is hired into such position his only progression is from lesser to greater seniority standing.[4] In any event, *Tilton* resolved such complications and attendant uncertainties in favor of the full seniority remedy for the protected category of employees.

Tilton supports petitioners' claim for retroactive seniority. Although it involved a grant of seniority to persons already employed before military service, the Congressional policy it recognized has also led this Court to approve agreements extending seniority rights to persons who had not, during the pertinent period, worked or even applied for jobs in which seniority was later conferred.

[3] See n.1, *supra*.

[4] Thus the "moving escalator" principle followed in *Tilton*, 376 U.S. at 174-5, is applicable only to the accumulation of employment date seniority Class 3 members would have had but for Bowman's discriminatory practices. That principle requires that class members be granted such seniority advancement.

Tilton also discusses the possible uncertainty of reconstructing the "but for" situation of the protected employees, 376 U.S. at 177-181, concluding that advancement should be assured if it was reasonably certain to occur (in foresight) and did occur (in hindsight), *id.* at 181. Since the only advancement of Class 3 members here would have been in seniority standing, and since such advancement was certain for any such person who has a retroactive claim—*i.e.*, who would have been hired absent Bowman's practices of discrimination—the *Tilton* test is met here.

Ford Motor Co. v. *Huffman*, 345 U.S. 330 (1953).[5] Title VII expresses a national policy no less urgent than that of the various post-World War II statutes protecting veterans' employment rights. The same remedy should be available here—one which does not subject employees in a protected group to permanently reduced seniority when Congress has determined that public policy favors their being made whole.[6]

Respectfully submitted,

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[5] See discussion in Petitioners' main brief at 37-38.

[6] The make-whole remedy due Petitioners would, of course, include back pay for individuals who lost income because of their reduced seniority status. Thus, Bowman's counsel's statement at argument that the Company has little practical stake in the result here was apparently limited to considerations of who would be able to obtain what job assignments. Bowman does face monetary liability.